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In The

Supreme Court of the United States

DONALD W. BAIN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Eighth Circuit is circumventing the rule of *Rita* by presuming the sentencing judge correctly understood and applied the law, when the record plainly shows the judge misstated and misunderstood the rule?

2) Whether the Eighth Circuit is circumventing the rule of *Gall* by creating its own preservation of error requirement that disavows the force of Rule 51(b) of the Federal Rules of Criminal Procedure?

PARTIES TO THE PROCEEDING

Petitioner (Defendant and Appellant below):

DONALD W. BAIN, JR.

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Respondent (Plaintiff and Appellee below):

THE UNITED STATES OF AMERICA

Represented by the Solicitor General

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PETITION FOR WRIT OF CERTIORARI

Petitioner Donald W. Bain, Jr. respectfully prays that a writ of certiorari issue to review the judgment below. In the alternative, Petitioner prays the Court summarily order the Circuit Court to remand this action for a new sentencing.

CITATIONS FOR OPINIONS BELOW

The judgment of the United States Court of Appeals appears in the Appendix [App.], beginning at page 1. It is published at *U.S. v. Bain*, 537 F.3d 876 (8th Cir. 2008). The judgment of the district court was not published. The full sentencing transcript is attached hereto in the Appendix beginning at page 23.

BASIS FOR JURISDICTION IN THIS COURT

This Petition arises from a direct appeal that granted final and full judgment against Petitioner. The action is on a criminal prosecution the Government initiated under 18 U.S.C. §§ 2252(a) and 2256. Petitioner pled guilty to one count of receiving and distributing child pornography and one count of possession of child pornography. The district court imposed a sentence of 210 months imprisonment. App. 37.

The Eighth Circuit affirmed in an opinion filed August 8, 2008. A petition for rehearing was denied

by a ruling filed October 6, 2008. App. 42. Jurisdiction in this court is under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Constitution of the United States:

Amendment 5

> No person shall be . . . Deprived of life, liberty or property without due process of law. . . .

United States Code:

18 U.S.C. § 687; Rule of Criminal Procedure:

Rule 1

> (1) **In General.** These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States. (Rule 1(1) F.R.Cr.P.)

Rule 51

> **RULE 51.** Preserving Claimed Error
>
> **(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.
>
> **(b) Preserving a Claim of Error.** A party may preserve a claim of error by informing the court when the court ruling or

> order is made or sought – of the action the party wishes the court to take, **or** the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103 (emphasis added).

18 U.S.C. § 3742(f)(1):

> (f) **Decision and disposition.** – If the court of appeals determines that –
>
> (1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

STATEMENT OF THE CASE

The Government obtained an Indictment against Mr. Bain and filed it in the Southern District of Iowa on December 14, 2005. In Count I, the Indictment charged Receiving and Distributing Child Pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2256. Count II charged Possessing Child Pornography in violation of §§ 2252(a)(4)(B) and 2256. Mr. Bain entered open pleas of guilty to both counts on December 13, 2006. The action proceeded to sentencing before the Honorable John A. Jarvey on August 9,

2007. The judge imposed a sentence of imprisonment on Count I for 210 months and 120 months on Count II, to be served concurrently. App. 37.

Donald W. Bain, Jr. was born in 1959, and he grew up in the relatively small town of Iola, Kansas. His father was a teacher, school principal, and superintendent of the Iola schools. His mother worked some part-time jobs, "but was mainly a stay at home mother." Petitioner Bain described his mother as an emotional person who "put a lot of stock in her faith." His childhood was stable and his family relationships were warm. He "has maintained very close relationships with his three sisters." Although his father was often absent while pursuing his professional duties, Mr. Bain developed a great deal of respect toward his father's devotion to his profession. He told the presentence investigator "that he had a lot of respect for his father's knowledge and the pride he took in his job as an educator, school principal, and superintendent." (Presentence Investigation Report [PSIR], pp. 12-13).

Not surprisingly, Mr. Bain's school years were marked by several accomplishments. He was a student council president. Don was an active participant on the track, baseball, football and basketball teams, as well as other school sponsored activities. After high school, he attended junior college in Iola, and finished with a 3.11 grade point. From there, he went on to the University of Kansas to earn degrees as both a Bachelor of Architecture and a Bachelor of Environmental Design. Through the years, Don obtained

architectural licenses in Arizona, California, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, Ohio and New York. (PSIR 13, 17).

While Don was in college, he started dating Lynda. They have now been married since 1989. Lynda had two children from a previous marriage. "According to Lynda, her children were young adults when she [married] the defendant, but the defendant has always been a second father to them and her children 'love the defendant dearly.'" (PSIR 13-14). In 2001, Don took a position as an architect with Stanley Consultants, and he and Lynda moved to Muscatine, Iowa. (PSIR 17). The Indictment in the instant action covered conduct from 2001 to February 9, 2005. (Indictment, 12/14/05). On February 9, 2005, federal agents executed a search warrant at Don and Lynda's home in Muscatine. Don was cooperative with agents and answered their questions as to how he got started in viewing child pornography on the Internet. It had been about a year and a half at that point since he had begun downloading images on his computer. He told the agents exactly how he had obtained the images, and he told them he had not downloaded anything in the few months before that February, 2005 interview. The agents seized a laptop computer, two towers and some disks. (PSIR 4-5). It was over ten months before Mr. Bain was indicted.

At his Initial Appearance on December 30, 2005, Magistrate Judge Thomas J. Shields released Mr. Bain on pretrial release with supervision and an unsecured appearance bond. (Order Setting

Conditions, 12/30/05). He continued his employment with Stanley Consultants. On January 23, 2006, Mr. Bain voluntarily met with an FBI special agent to offer all the information and assistance he could in regard to the ways in which child pornography is found and traded on the Internet. "Bain stated he only traded child pornography files from his home and never exposed any members of his family to these files." He never purchased or sold any of the images. It was all obtained and re-distributed by downloading and file sharing on the net. (PSIR 6-7, 9-10).

Mr. Bain told the FBI his downfall evolved from his fascination with the Internet. His explanation and description of his conduct was extensive, not only to the FBI, but also to the presentence investigator, two psychologists and the sentencing judge. Judge Jarvey referred to the psychologists' evaluations as a "psychosexual investigation" and stated he would "rely heavily" on those reports in selecting the sentence. App. 36. That investigation was initiated by Dr. David McEchron, Ph. D. The presentence investigator summarized the doctor's diagnosis:

> In Dr. McEchron's opinion, the defendant "qualifies for diagnoses of Adjustment Reaction with Mixed Features of Anxiety, Depression, and Paraphilia, NOS," but does "not meet the criteria for a diagnosis of pedophilia" and does not appear to present a significant risk to the community at large. Based on the various risk protocols applied to the defendant, Dr. McEchron believes the

> defendant falls in the low risk category for re-offense. (PSIR 16).

The Government later hired a psychologist to conduct an evaluation of Mr. Bain. That psychologist returned the same diagnosis and prognosis of low risk of recidivism. (PSIR 17-18). Mr. Bain wandered into his crimes initially through what could only be described as an obsession with the Internet. He told the presentence investigator that, prior to the search warrant, he was spending two to three hours per night on the net. He originally had perused sites that dealt with violence and death, and was in related chat rooms exchanging files. The child pornography first appeared to him as it was intermingled with violence files. He then explored pornographic sites. Don told the FBI, on the day the search warrant was executed, that he "was flabbergasted that this stuff existed." He said "he got carried away in seeing how far it would go." (PSIR 5, 9). Other than the instant case, Mr. Bain has **no** juvenile or adult criminal history. (PSIR 11-12).

Mr. Bain eventually explained to the sentencing judge that he did not collect these images out of sexual stimulation, rather "it was more utter dismay of wondering how far this information would go." He told the judge, "I was astonished by it. I was intrigued by it. I was passing a wreck on the freeway." App. 32. In another analogy, Don told the presentence investigator "the images were similar to pieces of paper or trash on the street that he picked up and looked at. He discarded them and others picked them

up." Similarly, when first confronted by the FBI at his home, he told the agents the images didn't mean much to him, and he could immediately stop the conduct. (PSIR 5, 9). Mr. Bain's explanations of his offenses are all consistent with the psychosexual investigation Judge Jarvey relied heavily upon. The testing and protocols disclosed there was no pedophillia and a low risk for re-offense. (PSIR 16).

At sentencing, Petitioner's attorney offered an extensive summary to show that Mr. Bain had been completely reliable and responsible toward the Government since the day the FBI knocked on his door. He had virtually traveled around the world in the pre-indictment and pretrial phases of the case, and always complied with all requirements of supervision. He had done everything possible to attempt to assist the FBI to investigate the ways child pornography is traded on the Internet. He was a man who had no criminal history. Experts hired by both parties determined there was no evidence Don was a predator. He was losing a great career and a wonderful family life. Don, quite obviously, would never commit another crime. His attorney told Judge Jarvey there was no necessity to impose any imprisonment beyond the 60 months minimum mandated by statute, and he requested that sentence. The first four words out of the judge's mouth were, "I can't do that." He went on to explain the constraints of the presumption of reasonableness and the Extraordinary Circumstances Test. App. 25-30. After the prosecutor told the judge the Government would be "content" with a sentence

at the bottom of the Guidelines range, the judge imposed the minimum recommended by the range – 210 months. App. 35-37.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals for the Eighth Circuit has carved out a distinction between the procedural reasonableness in the structural proceedings of a sentencing and the substantive reasonableness of the severity of the imprisonment imposed. The *Gall* decision instructed sentencing judges to engage in analysis of the application of the Sentencing Guidelines as the first step in determining a fair and reasonable sentence. A fair and reasonable sentence is defined by statute. In 18 U.S.C. § 3553(a), Congress directs judges to impose a sentence that will be "sufficient, but not greater than necessary" to carry out the goals of that subsection. The Circuit examines the length of a sentence of imprisonment for its reasonableness toward carrying out those goals. That question is generally referred to as substantive reasonableness. The review examines the judge's exercise of discretion to carry out that legislative intent. In the Eighth Circuit, defendant's attorney is not required to raise any particular objection or motion to preserve that issue for appeal. On the other hand, the sentencing judge's calculation and application of the Guidelines is treated in the Eighth Circuit as a procedural issue. Trial level counsel is generally required to make a specific objection to the

sentencing judge's method of applying the Guidelines in order for the Eighth Circuit to agree to review the sentence for harmless error. If a specific objection is not posed, the Circuit reviews an improper application of the Guidelines on the standard of plain error.

The Eighth Circuit has developed other devices to deny defendants fair review of their sentences. Two months before the *Gall* decision was filed in this Court, Mr. Bain filed his opening brief in the Court of Appeals and assigned error for the sentencing judge's use of the Extraordinary Circumstances Test. After *Gall* was filed, Mr. Bain's appellate counsel filed a proper Citation of Supplemental Authority on December 20, 2007, to direct the appellate court's attention to *Gall*. In the instant case, the panel acknowledged this Court had struck down the Eighth Circuit's use of an Extraordinary Circumstances test in the *Gall* decision. While acknowledging the instant case had gone to sentencing four months before the *Gall* decision in this Court, the panel found the *Gall* error in Petitioner Bain's sentencing had not been properly preserved for review. App. 7-9. The panel determined there was "plain error" on the *Gall* violation, but decided Petitioner Bain had not established prejudice. On that plain error review, the three-judge panel determined Mr. Bain could not show there was a reasonable probability he would have received a lighter sentence absent the *Gall* error. App. 10-12. This was a sentence of almost 17 years imprisonment for a 48-year-old man who had absolutely no criminal history, who committed the crimes in the privacy of

the basement of his own home and never did anything beyond looking at and sharing pictures. The sentence was affirmed. In a concurrence, the Honorable Duane Benton stated he would have remanded the case because the *Gall* error vitiates any basis for a review of the substantive reasonableness of the sentence:

> The district court did not seriously consider Bain's arguments for a 60-month sentence; therefore the entire § 3553(a) explanation is tainted by the *Gall* error. *See Vickers,* 528 F.3d at 1122-1123 (Shepherd, J., concurring) (procedural error "thwarts reasonableness review – that is, it cuts off our review process before we even reach the issue of reasonableness"); *United States v. Langford,* 516 F.3d 205, 213 (3rd Cir. 2008) ("Our reasonableness review relies on a district court's reasoning from the starting point of the correctly calculated Guidelines through the § 3553(a) factors."). The record here does not indicate what sentence the district court believed was "sufficient but not greater than necessary." Due to the deferential abuse of discretion standard, the majority affirms the sentence based on explanations that may not reflect the district court's unrestrained opinion. App. 20.

The concurring opinion is strange in that it disagrees with the result the majority reached. The concurring judge believed the sentence should have been reversed for remand. He labeled his decision a concurrence only because he believed circuit

precedent required plain error review, and he agreed prejudice was not thereby established. He cited a Third Circuit opinion in support of remand. Curiously, the concurring judge then cited several Eighth Circuit cases that reversed sentences for procedural error. The concurrence noted two of those cases employed no analysis for harmless error, plain error, or substantive reasonableness. Judge Benton's decision is actually a dissent. App. 17-22.

The panel's opinion is also infected by other procedural tricks this Court must condemn. The sentencing proceeded less than two months after this Court's decision in *Rita*. Prior to his *Gall* error, and afterward, Mr. Bain's sentencing judge very plainly stated his misunderstanding of the *Rita* holding. The judge stated this Court held the Sentencing Guidelines are presumptively reasonable. The judge also incorrectly stated that the law in the Eighth Circuit also presumed the Guidelines are reasonable. He did not understand that the presumption of reasonableness is strictly an appellate standard he was not authorized to employ. He misunderstood the rationale of *Rita*. The decision does not find the Guidelines presumptively reasonable. The *Rita* decision allows an appellate court to presume a sentence is reasonable if a judge's independent assessment of a proper sentence under 3553(a) happens to fall within the range designated by the Guidelines. The rationale for the presumption is that two evaluators have independently found a proper sentence to be within the same range. In the face of the sentencing judge's

plainly incorrect understanding of *Rita*, the Circuit improperly relied on a presumption that the trial judge knows and correctly applies the law. The Circuit did not use this presumption just as a starting point for analysis of the *Rita* error. The panel used it as the starting *and* the end point. This plainly incorrect application of a presumption could be used to defeat any and every legal error trial judges make. Even though the judge states the law incorrectly, we can presume he correctly understood and applied the law?

The other procedural device the Eighth Circuit has employed in the wake of *Booker*, *Rita* and *Gall* defies the authority of the Federal Rules of Criminal Procedure. The panel ruled Mr. Bain did not preserve the assignment on the *Gall* error because his lawyer did not make a specific objection to the use of the Extraordinary Circumstances Test. As stated above, Petitioner's sentencing was four months before the *Gall* decision was filed in this Court. Mr. Bain's position on appeal was that his lawyer preserved all assignments on sentencing simply by telling the judge exactly what he wanted, i.e., the statutory minimum sentence of 60 months imprisonment. Rule 51(b) allows a party to preserve error by telling the judge what action he wants the judge to take **or** by objecting to the action the judge has taken. The panel acknowledged Petitioner's position in a footnote, but made no relevant analysis. The panel simply stated the Eighth Circuit requires an objection to be made to preserve *Gall* error. A circuit court has no authority to

make its own local rules that contravene the Federal Rules of Criminal Procedure. App. 9-10.

1. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *RITA* BY PRESUMING THE SENTENCING JUDGE CORRECTLY UNDERSTOOD AND APPLIED THE LAW, WHEN THE RECORD PLAINLY SHOWS THE JUDGE MISSTATED AND MISUNDERSTOOD THE RULE.

In attempting to persuade the *Booker* court that the Guidelines were not mandatory, and therefore not in violation of the Sixth Amendment, the Government pointed out that Congress provided for departure from the Guidelines. Justice Stevens soundly rejected the argument:

> Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. *U.S. v. Booker*, 543 U.S. 220, 234, 125 S. Ct. 738, 750 (2005).

In his majority opinion in Part II, Justice Breyer explained the importance of establishing a strong nexus "between a sentence and an offender's real conduct." Initially, the opinion acknowledged that the Guidelines do generally promote the goal of similar sentences for similar conduct. 543 U.S. at 251-254, 125 S. Ct. at 760-761. In the end, however, Justice

Breyer concludes the mandatory application of guideline ranges not only runs afoul of the Sixth Amendment, it also frustrates Congress's own intent in passing the Sentencing Act. By excising the mandatory provisions of §§ 3553(b)(1) and 3742(e), legislative intent is served, as stated, to "provide certainty and fairness in meeting the purposes of sentencing [while] avoiding unwarranted sentencing disparities . . . [and] **maintaining sufficient flexibility to permit individualized sentences when warranted**." 28 U.S.C. § 991(b)(1)(B), *Booker*, 543 U.S. at 264, 125 S. Ct. at 767. (emphasis added)

The Court then faced questions of how the advisory role of the Guidelines would be weighed in the sentencing process and on appellate review. In *Rita v. U.S.*, 127 S. Ct. 2456 (2007), the Court held it is permissible for an appellate court to employ a presumption of reasonableness. If a sentencing judge reaches an independent conclusion that a particular sentence is sufficient and necessary, and the terms also happen to fall within the range identified by the Guidelines, an appellate court may begin its review by presuming the judge's sentence is reasonable. At the same time, the Court determined a proper and independent evaluation of 18 U.S.C. § 3553(a) factors does not allow a sentencing judge to employ that presumption. 127 S. Ct. at 2462-2465. Stated differently, the presumption of reasonableness does not presume the Guidelines are reasonable for a particular case. It presumes the sentence a judge has

selected through an independent and full evaluation is reasonable.

In *Gall v. United States*, 128 S. Ct. 586 (2007), the Supreme Court reviewed this Court's decision reversing another sentence out of the Southern District of Iowa, imposed by the Honorable Robert W. Pratt. Following *Booker*, Judge Pratt had weighed the statutory sentencing factors in a drug conspiracy case. The undisputed Guidelines range was 30 to 37 months in prison. After a careful and detailed analysis, Judge Pratt determined imprisonment was not "necessary" and ordered Mr. Gall serve 36 months of supervised probation. The Eighth Circuit had reversed the sentence by deciding Judge Pratt had violated the Extraordinary Circumstances Test. The Court had ruled the variance from the low end of the Guidelines range at 30 months to no incarceration at all was a 100 percent variance, an "extraordinary" variance, that was not justified by any "extraordinary circumstances." *Gall*, 128 S. Ct. at 593-594.

The *Gall* court began by pointing out the Eighth Circuit's minute re-examination and revision of Mr. Gall's sentencing factors was not sufficient to reach the conclusion Judge Pratt abused his sentencing discretion. That was the standard of review dictated by the explanation of the "reasonableness" review explained in *Booker*.

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree

> of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence. 128 S. Ct. at 594-595.

The *Gall* court was also impressed by Judge Pratt's reasoning that explained the assurance of respect for the law is not always achieved by imposing the most punishment possible:

> The Government's legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law is at least to some extent off-set by the fact that seven of the eight defendants in this case have been sentenced to significant prison terms. Moreover, the unique facts of Gall's situation provide support for the District Judge's conclusion that, in Gall's case, "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." 128 S. Ct. at 599.

There is no logic in assuming respect for the law will continue to increase *ad infinitum,* as the punishment for a particular offense continues to increase. Subsection 3553(a)(2)(A) does not seek respect for

punishment, it seeks respect for the law. As the Preamble to our Constitution states, a primary objective of our law is "to establish Justice," it is clear Congress's intent, in promoting respect for the law, is defined as promoting respect for Justice. The statute ensures justice by directing judges to impose a sentence that is "sufficient, but not greater than necessary."

> If we desire respect for the law, we must first make the law respectable.
>
> – Louis D. Brandeis –

The undisputed calculation of the Guidelines range applied to Mr. Bain in the PSIR was for imprisonment from 210 to 262 months. (PSIR 21). App. 25. When the defense attorney requested Judge Jarvey impose only the statutory minimum imprisonment of 60 months, the judge himself objected:

> THE COURT: I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. App. 29-30.

The *Rita* decision specifically warned trial level judges that they were not to consider a presumption of reasonableness in determining sentences:

> We repeat that the presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate

> "reasonableness" review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines (cite). He may hear arguments by prosecution or defense that the Guidelines sentence should not apply. . . . Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure. . . . In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply. *Rita*, 127 S. Ct. at 2465, citing *Booker*, 543 U.S. at 259-260, 125 S. Ct. at 738 (emphasis supplied)

It is not surprising that the judge believed *Rita* had deemed the Guidelines scheme itself to be presumed reasonable. The Eighth Circuit had been making that error prior to *Rita*. (See: *U.S. v. Likens*, 464 F.3d 823, 825 (8th Cir. 2006): "The guideline range though advisory is presumed to be reasonable.") Judge Jarvey's words were perfectly clear. He obviously misread *Rita* to conclude he was to presume the Guidelines range was reasonable, and then work from there. The timing of Judge Jarvey's pronouncement also shows his application of the presumption. It is not clear whether the defense attorney was done with his argument when Judge Jarvey interjected with the presumption and his ruling that in order to

go below the Guidelines range, "there's got to be a ground for a variance." App. 30. The judge had not yet heard from Mr. Bain in allocution, nor had he heard from the prosecutor. The adversarial process had not been completed when the judge announced the presumption.

The fact the judge later referred to several section 3553(a) factors, does not cure the use of the presumption. The sentencing judge did the same thing in *U.S. v. Ross,* 501 F.3d 851 (7th Cir. 2007). Despite her discussion of several factors, the judge told the defendant she "could not sentence him below the Guidelines range" unless "he presented 'some kind of good reason' to do so." 501 F.3d at 854. Judge Jarvey did the exact same thing in the instant case when he directed the defense attorney to state a "ground" for a variance below the Guidelines. The *Ross* judge also stated the fact the defendant had a very close family, he had shown a commendable effort in legitimate work and that he took good care of his family could not be considered. The judge said it did not matter if she thought the "lowest sentence possible" was greater than necessary because she could not exercise that judgment. 501 F.3d at 852-853. The Seventh Circuit recognized the judge's discussion of other 3553(a) factors was only relevant to the judge's decision to impose the lowest Guidelines sentence:

> The court might have meant to convey a different thought, but throughout the sentencing hearing it suggested that a within-guidelines sentence was presumptively

> appropriate and that Ross's arguments for leniency were just not sufficient to overcome that presumption. *Ross*, 501 F.3d at 854.

Judge Jarvey did the same thing. After allocution, and hearing the Government's position, the judge again proclaimed the control of a presumption. In the midst of reciting the many factors he considered, the judge again pronounced: "The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals." [sic] In a telling omission in the pronouncement that followed, Judge Jarvey said that Mr. Bain's sentence at the bottom of the Guidelines range was "sufficient to address the essential sentencing considerations." The judge left out his opinion as to whether the sentence was not greater than necessary. App. 36-37.

The Eighth Circuit panel avoided the *Rita* error in Mr. Bain's sentencing by saying it just did not see any error:

> Bain's sentencing occurred one month after the Supreme Court decided *Rita*. *See Rita*, 127 S. Ct. 2456 (decided June 21, 2007). "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609 (2002). Presumably, the district court realized that the presumption of reasonableness is only an appellate presumption, and this was its meaning when it stated the guidelines are presumed reasonable in the Eighth Circuit, as affirmed by

> the Supreme Court. *See United States v. Gray*, ___ F.3d ___, ___, No. 07-2099, slip op. at 2 (8th Cir. July 18, 2008) (noting *Rita* was "hardly [an] obscure decision[ ] likely to have been overlooked by federal sentencing judges. . . . "). The district court here did not commit *Rita* error. App. 6.

Mr. Bain's sentencing was actually over a month and a half after *Rita*, but that is not the important point. Judge Jarvey had not "overlooked" *Rita*. Mr. Bain has always argued the judge misunderstood *Rita*. He clearly knew about *Rita*, but did not realize he had no authority to invoke the presumption. He did not understand that *Rita* does not conclude the Guidelines themselves are reasonable. The panel ignored these arguments by simply saying we must presume the judge knew what he was talking about. Obviously, the presumption the panel quoted from *Walton* is a rebuttable presumption. If it were not, it could be used to affirm every clear misinterpretation of law a trial judge could voice. Judge Jarvey clearly stated his misunderstanding of *Rita* and clearly erred in these three particulars:

> (1) "I can't do that. Hang on. In order to go below the Guidelines . . . there's got to be a ground for a variance. . . .
>
> (2) "[T]he Guidelines . . . are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable. . . . App. 29-30; and

> (3) "The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals." App. 36.

The Eighth Circuit used the Extraordinary Circumstances Test to thwart the relief from mandatory Guidelines that this Court had plainly and thoroughly mandated in *Booker*. By using this ill-placed presumption from *Walton* to apply a correctness presumption to the judge's plainly incorrect application of the law, the Eighth Circuit has now thwarted the relief this Court provided in *Rita*. "In light of *Rita*, the district court's application of reasonableness was a significant procedural error." *U.S. v. Greene*, 513 F.3d 904, 907 (8th Cir. 2008).

2. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *GALL* BY CREATING ITS OWN PRESERVATION OF ERROR REQUIREMENT THAT DISAVOWS THE FORCE OF RULE 51(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Judge Jarvey's initial objection to defense counsel's request for the mandatory minimum sentence was directly referring to the presumption of reasonableness. His next pronouncement referred to this Court's use of the Extraordinary Circumstances Test:

> I mean, what are the grounds for a variance of as much as two-thirds to three-fourths of the sentence under the Guidelines?
>
> [DEFENSE COUNSEL]: Well –

> THE COURT: People who cooperate and put their life at risk, [sic] if the Court gives them more than 45 or 50 percent off for putting their life at risk, [sic] the Court of Appeals reverses that as an unreasonable sentence. Here, what would the grounds be for a variance of the magnitude you are talking about? App. 30.

Judge Jarvey, of course, was citing the Eighth Circuit rule that had been in place before and after the Supreme Court held in *Booker* that the Guidelines were no longer mandatory. He was laboring under the rule reaffirmed in *U.S. v. Gall*, 446 F.3d 884 (8th Cir. 2006) four months before this Court struck it down. The Eighth Circuit had developed a two-step process. The Court first conducted a de novo review to determine whether the sentencing judge applied the Guidelines correctly. If the Guidelines were applied correctly, the Court would then review for an abuse of discretion in any decision to depart from the Guidelines range. *U.S. v. Mashek*, 406 F.3d 1012, at 1016-1017 (8th Cir. 2005). In *U.S. v. McMannus,* 436 F.3d 871, 874 (8th Cir. 2006), the Circuit explained its rules for reviewing sentences outside the Guidelines range. "A sentence outside the Guidelines range is not presumed to be reasonable." The sentencing judge is encouraged to review 3553(a) factors, and then "determine whether to impose a sentence under the Guidelines or a non-Guidelines Sentence. . . . However, the farther the district court varies from the presumptively reasonable range, the more compelling the justification based on the 3553(a)

factors must be." The Court had summed up the departure rule in *U.S. v. Dalton,* 404 F.3d 1029, 1033 (8th Cir. 2005): "An extraordinary reduction must be supported by extraordinary circumstances." The problem with the test is that it does not allow for an independent and comprehensive review for the judge to reach his own conclusion as to the sentence that is sufficient, but not greater than necessary. This Court rejected the Eighth Circuit's Extraordinary Circumstances Test in *Gall*. The decision did approve a two-step process that first examines the record for any procedural error, including an improper application of the Sentencing Guidelines. It is only when the court of review finds no procedural defect that it may move on to evaluate the sentence for substantive reasonableness, however:

> Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. . . . But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. *Gall*, 128 S. Ct. at 597.

This holding amplified the *Rita* explanation that a judge does not need a certain, single ground for a sentence below the Guidelines range. Judge Jarvey obviously thought he needed that one shining reason

for any variance to overcome the presumption of reasonableness. He thought he needed an extraordinary reason to grant the extent of deviation Mr. Bain's attorney was requesting. Judge Jarvey violated both *Rita* and *Gall* in that process. The Eighth Circuit now treats claims of significant procedural error in sentencing as subject to a strict preservation of error standard requiring a specific objection. On the other hand, the Circuit believes no objection is necessary for a defendant to gain a review for substantive reasonableness. App. 8, 12-13. The *Gall* decision does not authorize treating procedural reasonableness any differently than substantive reasonableness. *Gall*, 128 S. Ct. at 597. The panel did agree with Petitioner that there was *Gall* error. After "presuming" there was no *Rita* error, the panel's comment on the presumption of reasonableness was strangely intertwined in its analysis of the Extraordinary Circumstances issue:

> The fact that the district court twice mentioned the appellate presumption of reasonableness reinforces that it felt constrained by this circuit's (then) strict percentage review, and did not independently consider Bain's arguments that a 60-month sentence was sufficient but not greater than necessary to meet the sentencing goals of § 3553. *See Gall*, 128 S. Ct. at 595, 597 (district court "must make an individualized assessment based on the facts presented"); *Burnette,* 518 F.3d at 946-47 (district court's statement that the Court of

> Appeals is very tough on variances and "sentences below the guidelines range to amount to anything are not easily accomplished" was error after *Rita* and *Gall*). The district court erred here. By requiring extraordinary circumstances, it misapprehended its authority to issue a non-guidelines sentence. *See United States v. Tabor*, ___ F.3d ___, ___ No. 05-2169, slip op. at 6 (8th Cir. July 10, 2008) ("[S]ignificant procedural error occurs if the district court fails to understand the scope of its authority and discretion at sentencing.") App. 7-8.

So, after "presuming" Judge Jarvey correctly understood the proper appellate application of the presumption of reasonableness should not affect his independent evaluation of § 3553(a) factors, the panel then said the references to the presumption of reasonableness show the judge "felt constrained." The Tenth Circuit has observed a judge's reference to the presumption of reasonableness is especially suspect if he then imposes a sentence at the bottom the Guidelines range. "The defendant was sentenced at the very bottom of his advisory guideline range, a sign we have taken in the past to indicate the court may have done something differently had it not felt mistakenly bound by the guidelines." *U.S. v. Conlan*, 500 F.3d 1167, 1170 (10th Cir. 2007). Was the presumption of reasonableness having an improper effect on Judge Jarvey's sentencing evaluation? Yes, it was, and so was the Extraordinary Circumstances Test. The quote above shows the panel knew Mr. Bain's sentence was

defective in two significant procedural errors, but chose to do nothing about it.

Prior to *Gall*, the Eighth Circuit viewed 18 U.S.C. § 3742(f)(1) as a mandate requiring remand. That subsection provides:

> (f) **Decision and disposition.** – If the court of appeals determines that –
>
> (1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

In *Mashek*, the Court explained that it would not be at liberty to affirm a sentence that ran afoul of the foregoing statute. The Court could *not* determine the sentence was reasonable, and affirm it in spite of the error:

> The duty to remand **all** sentences imposed as a result of an incorrect application of the guidelines exists independently of whether we would find the resulting sentence reasonable under the standard of review announced in *Booker*. As the Supreme Court has recognized in the context of departures, § 3742(f) does not provide for a reviewing court to affirm a sentence based on its overall reasonableness when it was imposed as a result of an incorrect application of the guidelines. Instead, § 3742(f)(1) commands the reviewing court to remand a case where the district

> court incorrectly applied the guidelines. *Williams v. United States*, 503 U.S. 193, 201-203, 112 S. Ct. 1112, 117 L. Ed. 2d 341 (1992). *Mashek*, 406 F.3d at 1012. (emphasis added)

The panel determined Mr. Bain was sentenced in violation of *Gall*. Of course, the record also plainly shows Judge Jarvey also violated *Rita*. The panel refused to explain why these violations and the resulting incorrect application of the Guidelines did not mandate remand in the instant case. The statute and the Circuit's language in the quote above show this error is not to be treated with any facile applications of technical rules of error preservation.

The struggle the circuit courts are having with the procedural aspects of sentencing in the wake of *Rita* and *Gall* is exemplified by Judge Benton's opinions that are completely inconsistent between the instant case and one filed five months earlier in *U.S. v. Burnette*, 518 F.3d 942 (8th Cir. 2008). Writing for a unanimous panel in *Burnette*, Judge Benton quoted this statement from the sentencing judge:

> I know that the Court of Appeals is very tough on variances, sentencing outside the guidelines. A sentence within the guidelines is presumed to be reasonable, and it appears to me that sentences below the guidelines range to amount to anything are not easily accomplished. 518 F.3d at 946-47.

If anything, the foregoing quote is less clearly a violation of *Rita* than Judge Jarvey's quotes in the

instant case. In *Burnette*, Judge Benton found the foregoing quote a violation of *Rita* and *Gall*. In the instant case, he went along with the majority's decision there was no *Rita* error. In *Burnette*, Judge Benton went on to evaluate the sentence and affirm it on substantive reasonableness. In the instant concurrence, he said *Gall* error precludes that type of evaluation.

The majority in the instant case, avoided the grant of relief on the *Gall* issue by excising the first half of the first sentence of Rule 51(b) of the Federal Rules of Criminal Procedure. The rule provides:

> **RULE 51.** Preserving Claimed Error
>
> **(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.
>
> **(b) Preserving a Claim of Error.** A party may preserve a claim of error by informing the court when the court ruling or order is made or sought – of the action the party wishes the court to take, **or** the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

The panel has given no effect to the "or" that is emphasized above. The Eighth Circuit wants trial lawyers to make appellate arguments, but the rules

do not require that, and the Federal Rules cannot be abrogated by local rules. The Federal Rules of Criminal Procedure were adopted by the Supreme Court's order of December 26, 1944, pursuant to 18 U.S.C. § 687. The Rules are the law of the land in the federal courts. The various federal courts cannot make their own local rules that are inconsistent with those of the Supreme Court and Congress. Rule 1 dictates:

> (1) **In General**. These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States. (Rule 1(1) F.R.Cr.P.)

In *Wingo v. Wedding*, 418 U.S. 461, 472, 94 S. Ct. 2842, 2849 (1974) the Supreme Court struck down a local rule that allowed a Magistrate Judge to conduct evidentiary hearings in habeas actions. The Court found the rule violated 28 U.S.C. 2243 and the Federal Magistrates Act. The local rule was invalid, as it was inconsistent with federal law. Similarly, the panel in the instant case has ruled this Circuit does not recognize the first half of the first sentence of Rule 51(b). If this is true, the local rule is inconsistent with Rule 51 and without authority. Review for plain error on the *Rita* and *Gall* issues in the instant case would be improper as defense counsel clearly informed Judge Jarvey of the exact ruling he was seeking at sentencing. App. 28-29.

In his concurrence herein, Judge Benton joins a growing chorus across the circuits. As explained

above, Judge Benton had clearly changed his view on this problem in five months time. In *Burnette*, he found *Rita* and *Gall* error, but moved on to affirm the sentence on substantive reasonableness. In the instant case, the basis of Judge Benton's concurrence was this:

> This case illustrated the difficulty of conducting substantive review, after a finding of *Gall* error. App. 19.
>
> * * *
>
> Since this Court has no reliable basis for substantive review, this sentence should be reversed for resentencing in order to fulfill the mandate of *Gall*. App. 21.

In a dissent in the Sixth Circuit, Judge Clay was joined by five other judges in concluding that Rule 51 requires a defendant to voice an objection to a calculation of the Guidelines range to preserve error on the calculation, but beyond that, Rule 51 does not "[impose] upon the defendant that further obligation to challenge the 'procedural reasonableness' of his sentence before the district court." *U.S. v. Vonner*, 516 F.3d 382, 399 (6th Cir. 2008). This dissent stated it was a violation of "the most basic principles of fairness and due process," to subject a procedural reasonableness challenge to plain error review. The dissent explained that *Booker, Rita* and *Gall* command a review of a sentence for reasonableness. Regardless of whether it is substantive reasonableness or procedural reasonableness, the only standard

of appellate review is reasonableness. 516 F.3d at 382.

In a separate dissent in *Vonner*, Judge Moore was joined by four others. She wrote:

> The majority's plain-error analysis also deepens a growing circuit split that surely merits attention of the Supreme Court, and the majority fails to offer meaningful guidance to the district courts and litigants in the circuit. 516 F.3d at 406.

That is the central reason this Court must act at this time. The circuits are all over the board with differing standards of review, and defendants are left with unfair sentences marked by an abuse of discretion. The circuits are able to pick and choose where they want to grant relief by manipulation of the words spoken and a multiple choice of standards to employ.

It appears the Sixth Circuit would have reviewed Mr. Bain's claim of *Gall* error without resorting to a plain error review. The majority in *Vonner* explained that the Sixth Circuit invokes the plain error standard on sentencing only when the sentencing judge asks the parties, after pronouncing the sentence, whether there are any objections to the sentence. Mr. Vonner's counsel had failed to respond to that question at the time of sentencing. 516 F.3d at 385. In the instant case, Judge Jarvey did not ask whether there were any objections to the sentence.

In *Koon v. U.S.*, 518 U.S. 81, 100, 116 S. Ct. 2035 (1996), this Court said, "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." The Court must mandate that all sentences marked by an abuse of discretion must be reviewed for reasonableness. The process cannot be diluted by the occasional use of alternate standards of review or presumptions of correctness. The process must be uniform and comport with Justice.

CONCLUSION

The panel has penalized Mr. Bain's attorney for not raising an objection to the *Gall* error at the sentencing that took place four months before the *Gall* decision was filed. The injustice is best reflected by Judge Clay's conclusion in the *Vonner* dissent:

> Moreover, by transforming *Booker*'s required reasonableness review into mere plain error review when a defendant does not raise a separate objection to the "procedural reasonableness" of his sentence at the time of sentencing, the majority evades the responsibility, imposed on us by *Gall*, to ensure that a defendant is afforded the opportunity to have his sentencing arguments considered and is given an adequate explanation of the reasons for the deprivation of his liberty. *See Gall*, 128 S. Ct. at 597. ***Vonner***, 516 F.3d at 406.

The panel decision has violated Mr. Bain's Fifth Amendment right to due process. The Court must grant certiorari or summarily order the Circuit to remand the case for resentencing.

Dated: December 29, 2008

Respectfully submitted,

KENT A. SIMMONS
Attorney for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-2981

United States of America, Appellee, v. Donald W. Bain, Jr., Appellant.	*	Appeal from the United States District Court for the Southern District of Iowa. [PUBLISHED]

Submitted: April 15, 2008
Filed: August 8, 2008

Before GRUENDER, BALDOCK,[1] and BENTON, Circuit Judges.

PER CURIAM.

Donald W. Bain, Jr., pled guilty to one count of receiving and distributing child pornography (Count 1), and one count of possession of child pornography

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[1] The Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit Court of Appeals, sitting by designation.

(Count 2), 18 U.S.C. §§ 2252(a)(2), 2256. The district court[2] sentenced him to 210 months imprisonment on Count 1, and 120 months on Count 2, to be served concurrently. Bain appeals the sentence. Having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b)(1), this court affirms.

I.

On February 9, 2005, the FBI, acting on a tip from the Norwegian government, executed a search warrant at Bain's house. Agents seized three computers and numerous floppy disks containing 496 images and digital movies depicting minors engaged in sexual acts. Bain admitted to the FBI that he traded child pornography files from his home, using the file sharing program "Kazaa."

After being indicted, Bain was placed on pre-trial release, with supervision and an unsecured appearance bond. He was allowed to travel outside the country several times, with permission of the court. He underwent two psychological examinations, each concluding that he did not meet the criteria for a diagnosis of pedophilia, and that he presented low risk of re-offense.

The PSR determined the base offense level as 22. This was increased two levels because some material

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[2] The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

involved minors under age 12, U.S.S.G. § 2G2.2(b)(2); five levels because he traded the material for more child pornography, U.S.S.G. § 2G2.2(b)(3)(B); four levels because some material portrayed sadism, masochism, or other depictions of violence, U.S.S.G. § 2G2.2(b)(4); two levels because he used a computer to receive and distribute material, U.S.S.G. § 2G2.2(b)(6); and five levels because the offense involved more than 600 images,[3] U.S.S.G. § 2G2.2(b)(7)(D). After a three-level decrease for acceptance of responsibility, Bain's total offense level was 37. With a criminal history category I, this translates to a guidelines range of 210 to 262 months.

At sentencing, Bain requested the statutory minimum sentence of 60 months, arguing the § 3553(a) factors. The district court responded:

> I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. I mean, what are the grounds for a variance of as much as two-thirds to three-fourths of the sentence under the Guidelines? People who cooperate and put their life at risk, if the Court gives them more than 45 or 50 percent off for putting

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[3] Although only 496 "images" were found, at least eight were video clips, which are assigned a value of 75 images each. *See* U.S.S.G. § 2G2.2 cmt. 4.

> their life at risk, the Court of Appeals reverses that as an unreasonable sentence. Here what would the grounds be for a variance of the magnitude you are talking about?

Bain told the court that "a grounds for variance that make it acceptable in the Guidelines does not exist." He went on to explain that his character, history, and the fact that he would not re-offend are reasons "that a long sentence is not necessary." The court did not respond.

After the government asked for the low end of the guidelines range, the court stated:

> You knew when you were doing it that it was wrong, you just didn't know how serious the punishment is for this offense and so you are right, you have – you're going to pay dearly, your wife is going to pay dearly, everybody associated with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

The court then considered the § 3553 factors, concluding that "a sentence at the bottom of the range is sufficient to address the essential sentencing considerations."

II.

Reviewing a sentence, this court must "first ensure that the district court committed no significant

procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 128 S. Ct. 586, 597 (2007). "If the decision was 'procedurally sound,' we then review the 'substantive reasonableness of the sentence' under the abuse-of-discretion standard considering the totality of the circumstances." *United States v. Alvizo-Trujillo,* 521 F.3d 1015, 1017 (8th Cir. 2008), *citing Gall,* 128 S. Ct. at 597.

A.

Bain argues that the district court procedurally erred by applying a presumption of reasonableness to the guidelines range in violation of *Rita v. United States*, 127 S. Ct. 2456 (2007), and by requiring extraordinary circumstances to justify a non-guidelines sentence in violation of *Gall,* 128 S. Ct. 586.

The district court twice referenced a presumption of reasonableness. First, after Bain asked for the statutory minimum sentence the court replied, "In order to go below the Guidelines pursuant to 3553 *which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable,* there's got to be a ground for a

variance." (emphasis added). Second, when announcing the sentence the court stated, "*The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals.* They are not mandatory, but they are based on extensive study and refinement." (emphasis added).

Bain's sentencing occurred one month after the Supreme Court decided *Rita*. *See Rita,* 127 S. Ct. 2456 (decided June 21, 2007). "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona,* 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona,* 536 U.S. 584, 609 (2002). Presumably, the district court realized that the presumption of reasonableness is only an appellate presumption, and this was its meaning when it stated that the guidelines are presumed reasonable in the Eighth Circuit, as affirmed by the Supreme Court. *See United States v. Gray,* ___ F.3d ___, ___, No. 07-2099, slip op. at 2 (8th Cir. July 18, 2008) (noting *Rita* was "hardly [an] obscure decision[] likely to have been overlooked by federal sentencing judges. . . ."). The district court here did not commit *Rita* error. *Cf. United States v. Burnette,* 518 F.3d 942, 946-47 (8th Cir. 2008) (district court's statement before *Rita* that a "sentence within the guidelines is presumed reasonable" was plain error after *Rita*), *petition for cert. filed,* No. 07-11317 (June 4, 2008).

Although the district court did not apply a presumption of reasonableness to the guidelines range, it committed *Gall* error by requiring extraordinary

circumstances to justify the requested non-guidelines sentence.

Before *Gall,* this circuit "discourage[d] drastic reductions [in sentences] absent extraordinary circumstances, especially when the sentencing guidelines already significantly reflect the mitigating factors." *United States v. Gonzalez-Alvarado,* 477 F.3d 648, 651 (8th Cir. 2007). Bain's sentencing occurred four months before *Gall* "reject[ed] [ ] an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range." *Gall,* 128 S. Ct. at 595. The Court also "reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Id.*

Taking the district court's comments in light of the circuit law at the time, the court undoubtedly believed that extraordinary circumstances were required to justify Bain's requested sentence. When he asked for the statutory minimum, the district court said "I can't do that," noting that when district courts give reductions of "more than 45 or 50 percent off [the guideline range] for [defendants] putting their life at risk, the Court of Appeals reverses. . . . " The fact that the district court twice mentioned the appellate presumption of reasonableness reinforces that it felt constrained by this circuit's (then) strict percentage review, and did not independently consider Bain's arguments that a 60-month sentence was sufficient but not greater than necessary to meet the sentencing

goals of § 3553. *See Gall,* 128 S. Ct. at 595, 597 (district court "must make an individualized assessment based on the facts presented"); *Burnette,* 518 F.3d at 946-47 (district court's statement that the Court of Appeals is very tough on variances and "sentences below the guidelines range to amount to anything are not easily accomplished" was error after *Rita* and *Gall*). The district court erred here. By requiring extraordinary circumstances, it misapprehended its authority to issue a non-guidelines sentence. *See United States v. Tabor,* ___ F.3d ___, ___ No. 05-2169, slip op. at 6 (8th Cir. July 10, 2008) ("[S]ignificant procedural error occurs if the district court fails to understand the scope of its authority and discretion at sentencing.").

B.

If not preserved, procedural sentencing errors are reviewed only for plain error. *See Burnette,* 518 F.3d at 946. Bain asserts he preserved error by "informing the judge of the course of action he wished the judge to take, and by stating the exact sentence sought."[4]

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[4] The government argued that review is for abuse of discretion. A party's concession on the standard of review does not bind the court, as "[s]uch a determination remains for this court to make for itself." *K & T Enter., Inc. v. Zurich Ins. Co.,* 97 F.3d 171, 175 (6th Cir. 1996). *See also Worth v. Tyer,* 276 F.3d 249, 262 n.4 (7th Cir. 2001) (courts, not the parties, determine the standard of review; it cannot be waived), *citing Vizcaino v. Microsoft Corp.,* 120 F.3d 1006, 1022 n.4 (9th Cir. 1997) (en

(Continued on following page)

This circuit requires more than a request for a non-guidelines sentence in order to preserve *Rita* or *Gall* error; the defendant must object to the district court's erroneous application of the law. *See United States v. Gaddy*, ___ F.3d ___, ___, 07-2625, slip op. at 11 (8th Cir. July 14, 2008) (applying plain error review to *Rita* error because the defendant "did not object to the district court's alleged presumption"); *Alvizo-Trujillo*, 521 F.3d at 1018 (request for variance and statement that guidelines range was unreasonably high did not preserve alleged error because it "was merely commentary and was made before the district court announced the improper presumption and the sentence"); *United States v. Vaughn*, 519 F.3d 802, 805 (8th Cir. 2008) (applying plain error review to *Rita* error where defendant asked for variance, because the defendant did not object in the district court); *Burnette*, 518 F.3d at 946 (applying plain error review to *Rita* and *Gall* error because "[a]fter withdrawing his objections to the PSR, [the defendant] made no further objections to his sentence"); *United States v. Marston*, 517 F.3d 996, 1004 (8th Cir. 2008) (applying plain error review to *Rita* error because the defendant "did not object at sentencing that the district court's interpretation of the law was incorrect"). Because Bain did not object to the district court's requirement of extraordinary circumstances to

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banc) (O'Scannlain, J., concurring in part and dissenting in part); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1519 n.24 (5th Cir. 1994) (the standard of review cannot be waived).

justify the requested sentence, this court may only review for plain error.[5]

"Under plan error review, the defendant must show: (1) an error; (2) that is plain; and (3) that affects substantial rights." *Vaughn,* 519 F.3d at 804, *citing Johnson v. United States,* 520 U.S. 461, 466-67 (1997). A plain error will not be corrected unless (4) it seriously affects the fairness, integrity, or public

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[5] Bain cites Rule 51 to support his argument that he preserved the error here by requesting an "exact" non-guidelines sentence. *See* Fed. R. Crim. Po. 51(b) ("A party may preserve a claim of error *by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take,* or the party's objection to the court's action and the grounds for that objection.") (emphasis added).

Although requesting a non-guidelines sentence does not preserve *Rita* or *Gall* error, this court has held that requesting a variance based on the crack/powder-cocaine disparity is sufficient to preserve *Kimbrough* error. *See Tabor,* ___ F.3d at ___, No. 05-2169, slip op. at 6 (applying de novo review to *Kimbrough* error where defendant requested variance); *United States v. Cawthorn,* 527 F.3d 678, 679-80 (8th Cir. 2008) (same); *United States v. Thomas,* 524 F.3d 855, 860 (8th Cir. 2006) (same); *United States v. Lee,* 521 F.3d 911, 913-14 (8th Cir. 2008) (same); *United States v. Moore,* 518 F.3d 577, 580 (8th Cir. 2008) (same); *United States v. Roberson,* 517 F.3d 990, 995 (8th Cir. 2008) (same). *See generally United States v. Langford,* 516 F.3d 205, 222 (3rd Cir. 2008) ("In *Rita, Gall,* and *Kimbrough,* the Court sought to remedy the errors of many courts that 'continued to treat the Guidelines as virtually mandatory,' by reemphasizing their advisory nature as well as the broad discretion granted sentencing courts under § 3553(a)."), *quoting Rita,* 127 S. Ct. at 2474 (Stevens, J., concurring).

reputation of judicial proceedings. *United States v. Olano,* 507 U.S. 725, 732 (1993).

The *Gall* error here is plain. *See Burnette,* 518 F.3d at 947, *citing Johnson,* 520 U.S. at 468 (it is enough that an error be plain at the time of appeal). The issue is whether the error affected a substantial right.

An error affects a substantial right if it is prejudicial. *Olano,* 507 U.S. at 734. A sentencing error is prejudicial if there is a reasonable probability the defendant would have received a lighter sentence but for the error. *United States v. Pirani,* 406 F.3d 543, 552 (8th Cir. 2005) (en banc). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez,* 542 U.S. 74, 83 n.9 (2004). In light of the entire record, the reviewing court must be satisfied that "the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 83, *quoting Strickland v. Washington,* 466 U.S. 668, 694 (1984).

Bain was sentenced to the low end of the guidelines range. This alone is insufficient to establish a reasonable probability that he would have received a lower sentence. *Pirani,* 406 F.3d at 553. The district court stated that

> [Y]ou're going to pay dearly, your wife is going to pay dearly, everybody associated with

> you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

It is unclear whether the district court meant the sentence was harsh, or whether the district court meant it was unfortunate that an otherwise well-functioning member of society had committed this crime. The district court proceeded to consider the § 3553(a) factors, concluding that "[b]ased on all the circumstances of this case ... a sentence at the bottom of the range is sufficient to address the essential sentencing considerations." On this record, it is not clear what action the district court would have taken absent the *Gall* error. "[W]here the effect of the error on the result in the district court is uncertain or indeterminate – where we would have to speculate – the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error." *Pirani,* 406 F.3d at 553. Therefore, this court finds that Bain has not met his burden of showing a reasonable probability of a lower sentence. *See Gaddy,* ___ F.3d at ___, No. 07-2625, slip op. at 11 (no prejudice where district court stated the guidelines range was pretty stern, but "extensively discussed the § 3553(a) factors").

C.

Bain also asserts that his sentence is substantively unreasonable. No objection is needed to

preserve an attack on the substantive reasonableness of a sentence. *United States v. Wiley,* 509 F.3d 474, 476-77 (8th Cir. 2007). This court considers "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall,* 128 S. Ct. at 597.

Bain argues that this court should not apply a presumption of reasonableness to his within-guidelines sentence because of the district court's *Gall* error. "[T]he presumption [of reasonableness] reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one." *Rita,* 127 S. Ct. at 2463 (emphasis in original). When there is *Gall* error, the district court feels constrained by the guidelines, and therefore does not *independently* reach the same conclusion as to the proper sentence. If the district court and the Sentencing Commission did not independently come to the same conclusion, the rationale for the presumption disappears.

This court will therefore determine whether the 210 month sentence is substantively reasonable with regard to the § 3553(a) factors, without the presumption of reasonableness. The factors to be considered under § 3553(a) are:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;

(5) any pertinent policy statement issued by the Sentencing Commission;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Before sentencing Bain, the district court stated:

> I have considered the nature and circumstances of this offense and the history and characteristics of this defendant. I have considered the seriousness of the offense and note in that regard that the number of images involved here and the amount of trading of files puts this case above the garden variety, the offense in its most basic form.
>
> The Court has also considered the question of just punishment. The Court looked at the Presentence Report very hard to see any evidence of pedophelia or anything like that that would exacerbate this situation, aggravate the sentence.
>
> I have considered the issue of adequate deterrence to criminal conduct as I must and to the extent that a sentence of imprisonment can do such a thing in these cases, it will certainly have that effect.
>
> I have considered the need to protect the public from further crimes and rely heavily in that regard on the psychosexual investigation that was conducted in this case and which indicated that the – that Mr. Bain has a low risk for other problems and a high likelihood for successful rehabilitation.

> I have considered the sentencing options that are available. I have also, of course, considered the kind of sentences and the advisory sentencing range established by the Guidelines. The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals. They are not mandatory, but they are based on extensive study and refinement. They exhibit the will of Congress and they promote consistency in sentencing. Accordingly the Court looks to those Guidelines as an important though not singularly controlling factor to be considered.
>
> The Court has also examined the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct. We have had quite a number of people that are very similarly situated to Mr. Bain, successful, hard working, family people that get caught up in this and so we have a track record here in Federal Court and all across the Southern District of Iowa and it is, of course, important pursuant to the Guidelines and pursuant to Section 3553 to promote consistency among those sentences.
>
> I conclude that the Guideline system adequately addresses the circumstances of this defendant and the Sentencing Guideline range is reasonable.

Given the court's detailed consideration of the § 3553(a) factors, and the "deferential abuse-of-discretion standard of review that applies to all

sentencing decisions," *Gall,* 128 S. Ct. at 598, this court cannot say that a 210 month sentence is "outside the range of choice dictated by the facts of the case." *United States v. Jones,* 507 F.3d 657, 659 (8th Cir. 2007) (defining abuse of discretion in sentencing). *See Burnette,* 518 F.3d at 949 (finding guidelines sentence substantively reasonable despite *Rita* and *Gall* error); *Moore,* 518 F.3d at 580 (due to deferential standard of review and district court's careful explanation of § 3553(a) factors, high end of the guidelines sentence substantively reasonable with or without a presumption of reasonableness); *Vaughn,* 519 F.3d at 805-06 (finding guidelines sentence substantively reasonable despite *Rita* error).

III.

The judgment of the district court is affirmed.

BENTON, Circuit Judge, concurring.

I concur due to this circuit's precedent requiring plain error review of unpreserved procedural errors. I write separately because, on these facts, *Gall v. United States*, 128 S. Ct. 586 (2007), requires remand.

Before *Booker,* the Supreme Court interpreted 18 U.S.C. § 3742(f)(1) as requiring harmless error analysis of misapplication of the guidelines – which is a procedural error post-*Gall. See* ***Williams v. United States,*** 503 U.S. 193, 203 (1992). *Williams* addressed a district court's upward departure based on both

prohibited and authorized grounds. ***Id.*** at 196. After finding the error harmless under § 3742(f)(1), the Court reviewed the decision to depart for "reasonableness" under § 3742(f)(2), a review like post-*Gall* substantive review. *See* ***id.*** at 203-04 (reasonableness review involves the appellate court "examin[ing] the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence."). The Court stated that a "sentence thus can be 'reasonable' even if some of the reasons given by the district court to justify the departure from the presumptive guidelines range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure." ***Id.***

This court has determined that "nothing in *Gall* [] undermines *Williams* or makes harmless-error analysis inapplicable to procedural sentencing errors." ***United States v. Henson,*** ___ F.3d ___, ___, No. 07-1993, slip op. at 3 (noting that § 3742(f) was left intact by *Booker*). *See also* ***United States v. Vickers,*** 528 F.3d 1116, 1121 (8th Cir, 2008) (applying harmless error post-*Gall*); ***United States v. Greene,*** 513 F.3d 904, 908 (8th Cir. 2008) (same); ***United States v. Huff,*** 514 F.3d 818, 821 (8th Cir. 2008) (same).

Before *Gall,* this court ruled that plain error review applies to unpreserved *Booker* errors. *See* ***United States v. Pirani,*** 406 F.3d 543, 548-49 (8th Cir. 2005) (en banc). *Booker* required sentences to be reviewed only for "unreasonableness." ***United States***

v. Booker, 543 U.S. 220, 260-61 (2005). "*Gall v. United States* calls for an appellate court to conduct two layers of review, first for procedural soundness, then for substantive reasonableness." ***Vickers***, 528 F.3d at 1122 (Shepherd, J., concurring) (citation omitted). Post-*Gall*, this court continues to apply plain-error review to unpreserved procedural errors. *See, e.g.*, ***United States v. Alvizo-Trujillo***, 521 F.3d 1015, 1018 (8th Cir. 2008) (applying plain error post-*Gall*); ***United States v. Burnette***, 518 F.3d 942, 946 (8th Cir. 2008), *petition for cert. filed*, No. 07-11317 (June 4, 2008) (same).

This case illustrates the difficulty of conducting substantive review, after a finding of *Gall* error. The majority finds a *Gall* error here, but does not reverse under plain error review because the record does not indicate that the district court would have given a lower sentence had it been aware of its full authority to sentence outside the guidelines. The majority must then proceed to review the substantive reasonableness of the sentence, based on the district court's explanation of the § 3553(a) factors. *See* ***Gall***, 128 S. Ct. at 597 ("[T]he appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."). Unlike *Williams* where the appellate court could determine whether the authorized grounds alone justified the departure, here the court has no basis to judge whether the sentence is reasonable.

When Bain requested the 60-month sentence, the district court stated, "I can't do that,. . . . if the Court

gives [defendants] more than 45 or 50 percent off for putting their life at risk, the Court of Appeals reverses that as an unreasonable sentence." The district court did not seriously consider Bain's arguments for a 60-month sentence; therefore the entire § 3553(a) explanation is tainted by the *Gall* error. *See* ***Vickers***, 528 F.3d at 1122-23 (Shepherd, J., concurring) (procedural error "thwarts reasonableness review – that is, it cuts off our review process before we even reach the issue of reasonableness"); ***United States v. Langford***, 516 F.3d 205, 213 (3rd Cir. 2008) ("Our reasonableness review relies on a district court's reasoning from the starting point of the correctly calculated Guidelines through the § 3553(a) factors."). The record here does not indicate what sentence the district court believed was "sufficient but not greater than necessary." Due to the deferential abuse of discretion standard, the majority affirms the sentence based on explanations that may not reflect the district court's unrestrained opinion.

District courts must "make an *individualized* assessment" of the correct sentence, and "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." ***Gall***, 128 S. Ct. 586, 597 (emphasis added). Substantive review under *Gall* requires this court to defer to the district court's *unrestrained* opinion about what sentence is "sufficient but not greater than necessary," and the reasons therefor. *See also* ***Rita v. United States***, 127 S. Ct. 2456, 2468 (2007) ("The sentencing judge should set forth enough

to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising *his own legal decisionmaking authority.*") (emphasis added).

Since this court has no reliable basis for substantive review, this sentence should be reversed and remanded for resentencing in order to fulfill the mandate of *Gall*. *See* ***United States v. Pepper***, 518 F.3d 949, 953 (8th Cir. 2008) (reversing and remanding for resentencing – without harmless error, plain error, or substantive review – where the district court "procedurally erred by failing to explain adequately [defendant's] sentence and by relying predominantly on improper factors to determine the sentence variance"); ***United States v. Kemp***, 530 F.3d 719, 723 (8th Cir. 2008) (reversing and remanding because "we are not sure that the district court adopted the guidelines range recommended in the PSR"); ***United States v. Garcia-Hernandez***, 530 F.3d 657, 665-666 (8th Cir. 2008) (reversing procedural error of "relying on an erroneous factor" without harmless error, plain error, or substantive reasonableness analysis). *Cf.* ***United States v. Thomas***, 524 F.3d 855, 860 (8th Cir. 2006) (reversing and remanding *Kimbrough* error because it was unclear whether it would have varied from the guidelines range had it know [sic] it had the authority); ***United States v. Roberson***, 517 F.3d 990, 995 (8th Cir. 2008) (reversing and remanding *Kimbrough* error because "[w]hen a district court does not consider an argument because it is unaware of its power to do so, [ ] remand is appropriate.").

Because this circuit's precedent requiring plain error review of unpreserved *Gall* error does not allow a remand, I concur in the result.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CRIMINAL NO. 3:05-cr-582
-vs-	)	TRANSCRIPT OF PROCEEDINGS
DONALD BAIN JR.,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS, held before the Honorable John A. Jarvey, at the Federal Courthouse, Davenport, Iowa, commencing at 10:57 a.m., August 9, 2007, reported by Linda Faurote-Egbers, Certified Shorthand Reporter and Notary Public for the State of Iowa.

APPEARANCES

Plaintiff by: JOEL W. BARROWS
Assistant United States Attorney
131 East Fourth Street
Davenport, IA 52801

Defendant by: WILLIAM G. SCHICK
Attorney at Law
423 17th Street
Rock Island, IL 61201

Reported by:

Linda Faurote-Egbers
Certified Shorthand Reporter

[2] THE COURT: Please be seated. We are here in the matter of the United States of America versus Donald Bain, it is Criminal Case 05-582. Mr. Bain is before the Court for sentencing based on his plea of guilty on December 13, 2006, to Counts 1 and 2 of the December 14, 2005, Indictment. He is present and represented by William Schick and the government is represented by Joel Barrows.

Mr. Bain, you understand that you are before the Court today to be sentenced for your crimes?

THE DEFENDANT: Yes, sir.

THE COURT: I have received the Presentence Report and have reviewed it in its entirety. I have also received the packet of exhibits that was requested to be reviewed by counsel for the defendant.

Mr. Barrows, are you aware of any reason why sentence cannot be imposed today?

MR. BARROWS: No, Your Honor.

THE COURT: Mr. Schick, are you?

MR. SCHICK: No, Your Honor.

THE COURT: Mr. Schick, did you review the Presentence Report with your client in its entirety?

MR. SCHICK: Yes, Your Honor.

THE COURT: Did you find any factual inaccuracies that need to be resolved here today?

MR. SCHICK: No, Your Honor.

[3] THE COURT: Mr. Barrows, are you aware of any factual inaccuracies?

MR. BARROWS: No, Your Honor.

THE COURT: I accept then the Presentence Report as accurate in its entirety. Based on that, Mr. Bain has a total offense level under the Sentencing Guidelines of 37, criminal history category of I, which would ordinarily yield a Guideline range of imprisonment from between 210 to 262 months.

I would hear from you first, Mr. Schick, then from Mr. Bain and then from Mr. Barrows on the sentence to be imposed.

MR. SCHICK: Thank you, Your Honor. On February 9th of 2005 a search warrant was served on Mr. Bain's residence where he and his wife who is present in court today resided. From that time on we gave full cooperation to the government. He was interviewed on February 9, 2005, by a Special Agent Langdon. He was cooperative, he helped the agents locate what they were looking for. Then a period of time went by when there was no charge filed until December 14th I believe of 2005.

During that period of time, 2005, Mr. Bain believes in his recollection that he left the country

twice, he works for Stanley Consultants, engineering firm out of Muscatine, Iowa, and he was sent out of the country on two occasions, returned, just normal routine business for him.

After the arraignment on the Indictment in 2005 the defendant and I met with Special Agent Kaiser of the FBI on [4] January 15, 2006; on January 25th of 2006; on May 17th of 2006; we met again in my office because he wanted to use my computer to try – Agent Kaiser was trying to find out if there was any of the websites or the Internet sites that were on – were involved in this case, if any information could be obtained that would be helpful to the government. We met in my office on June 29, 2006, again on August 30, 2006.

After the August 30th meeting Agent Kaiser and Don Bain went to the Rock Island Public Library to see if they could use their computer because they were having trouble getting on to some of these or sites and at that time Don offered Mr. – Agent Kaiser the opportunity to come out to Muscatine if he wanted to use his wife's computer. Agent Kaiser then turned whatever information he had over to other authorities or the U.S. Attorney's Office and apparently nothing helpful came out of that.

Nevertheless there was a continued effort by my client to aid the government and furnish all the information he was capable of furnishing from his records, from his computers, from his memory.

This is an unusual case with an unusual situation. The defendant was granted use of his passport continuously, traveled outside the country several times with permission of the Court, all of which I believe are docketed. I believe Federal Probation Officer Donohoo presented every request for [5] travel to Judge Shields and most likely it is docketed in the court records, all those travel plans were approved.

Besides 2005 which there was no docket entries made because there's no charge filed yet, starting in 2006 after his first court appearance, Don was granted permission of the Court to travel to the United Arab Emirates in the Middle East in March of '06; went to Kuwait City in April of '06; went to Kuwait City in May of '06; went back to the United Arab Emirates in May of 2007; and in between time made several in-country trips which didn't require Court approval because his bond allowed him to travel inside the United States, but he always furnished Mr. Donohoo with the information where he was going.

He went to Beale Air Force base in California in August of '06; went to Vandenberg Air Force base in June and again in July of '07; went to Atlanta in August of '07. All of these were contracted business between the U.S. Army Corps of Engineers for master planning for the United States Air Force and Stanley Consultants and Mr. Bain was sent representing Stanley Consultants.

In addition to that there were a couple trips he reported to the Federal Probation Office to Kansas and Texas which were just relatives, visiting relatives, but it was an understanding between the Probation Office and Mr. and Mrs. Bain that any travel he had, even within the country, as a courtesy he would let the probation office know where he was going and [6] when he would be gone.

Title 18, Section 3553, states that the Court should impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in that section. It is my suggestion to the Court that this is a different case involving a very different individual where Guideline recommendations should not be followed.

There is a mandatory minimum 60 months that the statute requires and a sentence any greater than that I believe would exceed the purpose of Section 3553 and Mr. Bain does not require a higher sentence to straighten out his conduct or his thinking or his attitude or his criminal history. He has absolutely none.

This particular case closed out his career and his family life, he knows he is here to have a sentence imposed, he knows he is going to jail. It is – he has a statement he would like to make which he can express his feelings about it much better than I can.

I bring out all of this information and the Court has seen it all looking through the Presentence Report and the other exhibits and examining the

docket sheet to see that as we sit here today Mr. Bain still has his passport which he brought today in case he surrendered to the Court; but if he is allowed to continue to travel because he's trustworthy.

THE COURT: We have had no trouble with him and I have [7] visited with probation at great length about that. As we typically don't with people accused of this crime, that category of which that we can release on pretrial release, we're pretty, you know, Federal Courts are pretty agressive [sic] about detaining them if there is evidence of pedophelia [sic] or other problems associated with the crime. This is the crime in probably its most basic form but for the large number of images that were recovered here.

MR. SCHICK: A comment I would have on the images is that the evidence does show a large number of images, but a rather small number of more objectionable images that might aggravate. There would be a handful or two of images that would qualify, but part of the aggravation is the number. I understand. That we don't contest. We don't have 600 aggravating photographs, we have 600 child pornography photographs which puts it into a category of its own.

I urge the Court under the circumstances and the facts of this case and what is presented to the Court to impose a minimum mandatory 60 months.

THE COURT: I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as

affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a ariance. I mean, what are the grounds for a variance of as much as two-thirds to three-fourths of the sentence under the [8] Guidelines?

MR. SCHICK: Well –

THE COURT: People who cooperate and put their life at risk, if the Court gives them more than 45 or 50 percent off for putting their life at risk, the Court of Appeals reverses that as an unreasonable sentence. Here what would the grounds be for a variance of the magnitude you are talking about?

MR. SCHICK: A grounds for variance that make it acceptable in the Guidelines does not exist. What exists is I guess the outstanding character of Mr. Bain, the history of the last two years of what he's done while he's been on release, his responsibility to – his continued reporting to probation, he is the kind of person that a long sentence is not necessary to change because this situation is an aberration. It's something he did in the privacy of his basement that he did not realize the seriousness of it, although he doesn't deny he knew it was illegal.

He is an individual that stands out in my experience of handling criminal defense cases as a person that but for these Guideline recommendations, but for mandatory minimums, he's a prime candidate for probation; but this particular offense doesn't permit it.

THE COURT: Thank you, Mr. Schick. Mr. Bain, is there something you'd like to say in your own behalf before the Court imposes sentence?

[9] THE DEFENDANT: Given this opportunity I'd like to convey my thoughts regarding the situation –

THE COURT: Pull the microphone closer.

THE DEFENDANT: – that I find myself in. I feel I've been a productive member of society, I practiced my architectural profession for over 22 years and provided services to communties [sic] in which I've lived, commercial industry, the United States Government, including the war on the effort in Iraq.

I believe I've been a good husband and a decent father to my children, my marriage. I am a family-oriented individual that thinks a lot of values. I believe the fact that my wife has remained by my side through all this provides testament to that fact.

I acknowledge and understand that this is a terrible situation. I feel shame, embarrassment, and utter discontent with my actions. I have no other explanation than to admit that I feel I fell victim to the entry of unlimited information available on the Internet. The Internet is an environment that has no bounds, has no walls, provides no warnings. There are no legal speed limit signs posted on the Internet.

As I have been a law abiding person all my life I admit I was naive towards not what is considered

moral and illegal, but the line between moral and illegal. I can tell you with all certainty that a phone call from a legal entity stating [10] that what I was doing had this harsh of legal ramifications and what it means I immediately stopped, only a phone call, not a search warrant.

I am not trying to blame the legal system, I am not trying to spread blame away from myself because I should have known, I should have realized, I should have not only stopped, but never started.

THE COURT: How did you get started?

THE DEFENDANT: It was Internet chat rooms, exchanging files. They weren't all this type of files. Some of these files became intermingled in those files. To say continually is that it was more of utter dismay of wondering how far this type of information would go. I was astonished by it. I was intrigued by it. I was passing a wreck on the freeway. I am not blaming anyone but myself for my actions. I am, however, trying to convey my thoughts of how I got here.

I can tell you that since February 2005 when authorities entered my house with a search warrant as you might expect my life has turned upside down. Those offenses has [sic] caused me to sacrifice my career and undoubtedly negatively affected relationships with friends, past employers, past co-workers, and certainly family. Efforts to provide and as well as psychological evaluators have been costly in terms of finances, time, and most importantly mentally. Even

with all this the punishment to this point has largely been provided by [11] myself to myself.

I've been kicking myself for allowing myself to be put in this situation. I should have known better. In kicking myself for ruining myself which seemed to have promise, kicking myself for destroying respect of family, friends, and co-workers, and kicking myself for ruining my financial status. I have been kicking myself for putting my wife through all of this. Because of my actions I will be unable to provide for my wife.

My wife – my life as I know it is over. My work and career has been very important to me as well as relationships developed during that effort. Change is inevitable. Negative change is punishment. For me this process has been to date severe punishment. It has already taken place. Through the legal system has provided more than enough punishment for me to ensure that this will never happen again.

I'm sure that I will try my hardest to be the best community servant I can be or be allowed to be. I am sure that I will never want to cause any – want any cause for any connection with law enforcement ever again. And it's ensured that I will live my life as I did prior to this offense without knowing a lawyer.

What's to become of me now, you decide. Regretably [sic] I am here, regretably [sic] we are all here. Taking your time and all the other time, all the other people involved in this whole [12] effort,

regretably [sic] taking their time, I apologize for that. I apologize for my actions.

THE COURT: Thank you, Mr. Bain. Mr. Barrows?

MR. BARROWS: Thank you, Your Honor. Just a few comments, Your Honor. Mr. Schick did refer to this as an aberration. The government would take issue with that. I don't believe that this was an aberration. There is evidence that this behavior had gone on for some time.

This is a puzzling, troubling case, maybe as much what the defendant has thrown away here as for his conduct. Mr. Schick is correct, the defendant did try to cooperate. He made a sincere effort in that regard. The information was simply too old. There was no substantial assistance in this case and there will be no Motion in that regard.

Mr. Schick has discussed Mr. Bain's travels while he's been on pretrial release and it is true that he has been compliant, however, I would suggest the fact that the defendant has been rather generously accommodated in terms of his pretrial release conditions and work-related travels is of limited relevance to his sentence.

The Guidelines applicable in this case, Your Honor, do seem to adequately address the 3553(a) factors. That said, the government does believe that the low end of the Guidelines seem to meet the criteria of 3553(a) in this case.

Mr. Bain's comments here today do seem to indicate [13] that he rather thoroughly understands the ramifications of his behavior so for those reasons, Your Honor, the government would be content with the low end of the Guidelines in this particular case. Thank you.

THE COURT: Thank you. It is a terribly painful Presentence Report to read because of what you are throwing away here. You said there's no legal speed limit on the Internet. That's true enough, but you have had the benefit your whole life of loving, supportive relationships and you had a moral compass that was better than any speed limit sign on the Internet. You knew when you were doing it that it was wrong, you just didn't know how serious the punishment is for this offense and so you are right, you have – you're going to pay dearly, your wife is going to pay dearly, everybody associated with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

I have considered the nature and circumstances of this offense and the history and characteristics of this defendant. I have considered the seriousness of the offense and note in that regard that the number of images involved here and the amount of trading of files puts this case above the garden variety, the offense in its most basic form.

The Court has also considered the question of just punishment. The Court looked at the Presentence Report very [14] hard to see any evidence. of pedophelia [sic] or anything like that that would exacerbate this situation, aggravate the sentence.

I have considered the issue of adequate deterrence to criminal conduct as I must and to the extent that a sentence of imprisonment can do such a thing in these cases, it will certainly have that effect.

I have considered the need to protect the public from further crimes and rely heavily in that regard on the psychosexual investigation that was conducted in this case and which indicated that the – that Mr. Bain has a low risk for other problems and high likelihood for successful rehabilitation.

I have considered the sentencing options that are available. I have also, of course, considered the kind of sentences and the advisory sentencing range established by the Guidelines. The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals. They are not mandatory, but they are based on extensive study and refinement. They exhibit the will of Congress and they promote consistency in sentencings. Accordingly the Court looks to those Guidelines as an important though not singularly controlling factor to be considered.

The Court has also examined the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct. We have [15] had quite a number of

people that are very similarly situated to Mr. Bain, successful, hard working, family people that get caught up in this and so we have a track record here in Federal Court and all across the Southern District of Iowa and it is, of course, important pursuant to the Guidelines and pursuant to Section 3553 to promote consistency among those sentences.

I conclude that the Guideline system adequately addresses the circumstances of this defendant and the Sentencing Guideline range is reasonable. Based on all the circumstances of this case the Court concludes that a sentence at the bottom of the range is sufficient to address the essential sentencing considerations.

It is therefore the judgment of the Court that Donald Bain is hereby sentenced to the custody of the Bureau of Prisons for a term of 210 months on Count 1 of the Indictment and 120 months on Count 2, those sentences to run concurrently, meaning at the same time.

Upon release from imprisonment you shall be placed on supervised release for a term of 10 years. Within 72 hours of release from the custody of the Bureau of Prisons you shall report in person to the probation office in the district to which you are released.

While on supervised release you shall not commit another federal, state, or local crime. You shall not possess a firearm or other destructive device and shall not illegally [16] possess a controlled substance.

You shall abide by all the standard conditions of supervised release set out by the Sentencing Commission plus the following special conditions: You shall participate in and follow the rules of sex offender treatment as directed by the probation office. Sex offender assessments and treatments shall be conducted by therapists and polygraph examiners approved by the probation office who shall release all reports of such activity to the probation office.

You shall sign releases of information to allow professionals and law enforcement officers involved in your assessment, treatment, and behavioral monitoring to communicate and share documentation with each other. You shall comply with all sex offender laws for the state in which you reside.

You shall not view or possess any form of pornography, sexually stimulating or sexually oriented material. You shall not enter any location where pornography or erotica are the primary products for purchase or viewing. You shall not enter locations whose primary function is to provide so-called adult entertainment.

You shall obtain residences as approved by the probation office. You shall not utilize any sex-related adult telephone services, websites, or electronic bulletin boards. You shall provide the probation officer access to any financial records to ensure compliance with these conditions.

You shall not associate with anyone engaged in the [17] exploitation of minors. You shall not have any

contact with a child under the age of 18 unless accompanied by a responsible adult who is aware of your conviction and supervision status and who has been approved in advance by the probation office.

You shall not possess any type of camera or video recording device without probation approval. You shall not have access to or possess a computer at home or elsewhere without prior written approval of the probation office. You are not to possess or use a computer or any other device with a network card, modem, wireless card, or the like at any location without prior approval of the probation office.

You shall submit to a reasonable search of your property to ensure that you are in compliance with this condition. If you are not released through a community corrections center program while in the custody of the Bureau of Prisons, you shall reside, participate, and follow the rules of a community corrections center program as directed by the probation office for up to 120 days.

If approved to use a computer system in any way, you shall not use it in violation of the conditions of supervised release or in a criminal manner. You shall notify the probation office of any locations where you receive mail or the like matter. You shall not obtain employment or volunteer where you would be supervising, working with, or associating with people under the age of 18 and you shall participate in a program of [18] curfew supervision and/or electronic monitoring for the duration of your term of supervision as

approved by the Court annually. All is more specifically set forth in the Judgment and Commitment Order to be filed later today.

The Court finds that the defendant does not have the ability to pay a fine. He is ordered to pay $200 special assessment to the Victims Assistance Fund due and payable immediately without interest to the Clerk of Court for the Southern District of Iowa. He is remanded to the custody of the United States Marshal for execution of this sentence.

Mr. Schick, do you have a recommendation or a request with respect to the place of incarceration? Typically the best thing I think we can say right now is that we ask that he be incarcerated as close to home as possible.

MR. SCHICK: I have two requests, one that he be allowed to voluntarily surrender upon giving notice of where his sentence will be served so he can remain with his family until the sentence is to begin rather than taking him in custody today and the second request would be a minimum security facility as close as possible to Springfield, Missouri, where his wife will be residing.

THE COURT: We will ask that that sentence be served as close to Springfield, Missouri, as possible. Of course, there is a federal institution there, it is my recollection that that is primarily a medical institution so I don't know if they [19] will do it so I will recommend that he be incarcerated as close to Springfield, Missouri, as possible.

Request for self-surrender is denied. He has had a year and a half to get his life in order. We understand he has recently quit his employment. The probation is frankly concerned about his emotional condition right now. He's had time to get his affairs in order. It is time to go now.

You have the right to take an immediate appeal from this Order. Any appeal has to be filed within ten days from the entry of written Judgment. Judgment will be entered as I said either later today or at the latest first thing tomorrow.

Mr. Schick, do you have anything else?

MR. SCHICK: No, Your Honor.

THE COURT: Mr. Barrows?

MR. BARROWS: No, Your Honor.

THE COURT: Thank you. We are in recess.

(Proceedings concluded at 11:28 a.m., August 9, 2007.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-2981

United States,

Appellee

v.

Donald W. Bain, Jr.,

Appellant

Appeal from U.S. District Court for the Southern District of Iowa – Davenport (3:05-cr-00582-JAJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton would grant the petition for rehearing en banc.

Judge Melloy did not participate in the consideration or decision of this matter.

October 06, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

No. 08-820

In the Supreme Court of the United States

DONALD W. BAIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the district court had not applied a presumption of reasonableness in sentencing petitioner within the advisory Sentencing Guidelines range.

2. Whether a criminal defendant's contention on appeal that the district court committed procedural errors in imposing a criminal sentence is reviewable only for plain error when the defendant never informed the district court of his objections.

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In the Supreme Court of the United States

No. 08-820

DONALD W. BAIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 537 F.3d 876.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2008. A petition for rehearing was denied on October 6, 2008 (Pet. App. 42). The petition for a writ of certiorari was filed on December 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of receiving and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2), and possessing child pornography, in violation of 18 U.S.C.

2252(a)(4)(B). He was sentenced to 210 months of imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed. Pet. App. 1-22, 37.

1. On February 9, 2005, agents of the Federal Bureau of Investigation executed a search warrant at petitioner's house. The agents seized three computers and numerous computer disks containing hundreds of images and digital movies depicting minors engaged in sexual acts. The images in petitioner's collection were extremely graphic and depicted sadistic violence, torture, and rape. Petitioner admitted to the agents that he had engaged in online trading of child-pornography files from his home. Pet. App. 2; Gov't C.A. Br. 2-5.

2. A grand jury in the Southern District of Iowa returned an indictment charging petitioner with one count of receiving and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2), and one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Petitioner pleaded guilty to both counts. Gov't C.A. Br. 1.

3. The Probation Office prepared a Presentence Investigation Report (PSR). The PSR recommended a base offense level of 22 under the advisory Sentencing Guidelines. PSR ¶ 29. It also recommended several offense-level enhancements: (1) two levels under Guidelines § 2G2.2(b)(2) because some material involved minors under age 12; (2) five levels under Guidelines § 2G2.2(b)(3)(B) because petitioner had traded the material for more child pornography; (3) four levels under Guidelines § 2G2.2(b)(4) because some material portrayed sadism, masochism, or other depictions of violence; (4) two levels under Guidelines § 2G2.2(b)(6) because petitioner had used a computer to receive and dis-

tribute material; and (5) five levels under Guidelines § 2G2.2(b)(7)(D) because the offense involved more than 600 images. PSR ¶ 30. The PSR recommended a decrease of three levels for acceptance of responsibility, resulting in a total offense level of 37. *Id.* ¶¶ 36, 37. With a criminal history category of I, petitioner's advisory Guidelines range was 210 to 262 months of imprisonment. *Id.* ¶ 85.

At the sentencing hearing—which took place after this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), but before the Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007)—the district court accepted the PSR's Guidelines calculations. Pet. App. 25. Petitioner requested the statutory minimum sentence of 60 months, and the court responded:

> I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. I mean, what are the grounds for a variance of as much as two-thirds to three-fourths of the sentence under the Guidelines?

Id. at 29-30.

Petitioner acknowledged that "[a] grounds for variance that make it acceptable in the Guidelines does not exist," but argued that his character, history, and low likelihood of recidivism justified a lenient sentence. Pet. App. 30. The government disagreed with petitioner's claim that his offense was an aberration, but it suggested that a sentence at the bottom of the advisory Guidelines range would be sufficient. *Id.* at 34-35.

The district court then stated:

> It is a terribly painful Presentence Report to read because of what you are throwing away here. You said there's no legal speed limit on the Internet. That's true enough, but you have had the benefit your whole life of loving, supportive relationships and you had a moral compass that was better than any speed limit sign on the Internet. You knew when you were doing it that it was wrong, you just didn't know how serious the punishment is for this offense and so you are right, you have—you're going to pay dearly, your wife is going to pay dearly, everybody associated with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

Pet. App. 35. The court added that it had considered the Section 3553(a) factors, and it observed that "the number of images involved here and the amount of trading of files puts this case above the garden variety." *Ibid.*

The district court then stated that the Sentencing Guidelines "are presumed reasonable here in the Eighth Circuit Court of Appeals." Pet. App. 36. The court noted that the Guidelines "are not mandatory," but it recognized that they are "an important though not singularly controlling factor to be considered." *Ibid.* The court then stated that "[b]ased on all the circumstances of this case the Court concludes that a sentence at the bottom of the range is sufficient to address the essential sentencing considerations." *Id.* at 37. It therefore sentenced petitioner to 210 months of imprisonment. *Ibid.* After imposing sentence, the court asked petitioner's

counsel, "do you have anything else?" *Id.* at 41. Counsel replied, "[n]o, your Honor." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-22.

a. The court first considered petitioner's argument that the district court had committed procedural sentencing error by treating the Sentencing Guidelines as presumptively reasonable, in violation of *Rita*, and by requiring extraordinary circumstances to justify a non-Guidelines sentence, in violation of *Gall*. Pet. App. 5. The court held that the district court's references to the presumption of reasonableness were references to an appellate presumption, not to a sentencing-court presumption, and that the district court's approach therefore was not inconsistent with *Rita*. *Id.* at 6.

The court of appeals then held that the district court had "committed *Gall* error by requiring extraordinary circumstances to justify the requested non-guidelines sentence." Pet. App. 6-7; see *id.* at 6-8. The court noted that petitioner had requested a non-Guidelines sentence, but it found that request insufficient to preserve his claim of *Gall* error. *Id.* at 8-10. The court explained that, in order to preserve such a claim for plenary appellate review, a defendant "must object to the district court's erroneous application of the law." *Id.* at 9. Because petitioner had failed to raise such an objection at sentencing, the court of appeals reviewed the claim for plain error only. *Id.* at 9-10. Applying plain-error review, the court held that the district court's *Gall* error had not affected petitioner's substantial rights because petitioner had not shown a reasonable probability that he would have received a lower sentence if the error had not occurred. *Id.* at 11-12.

The court of appeals next reviewed, under an abuse-of-discretion standard, the substantive reasonableness

of petitioner's sentence. Because the district court had committed *Gall* error and therefore had not "*independently* reach[ed] the same conclusion" as the Sentencing Commission with respect to the proper sentence, the court of appeals did not apply the normal appellate presumption of reasonableness to the within-Guidelines sentence. Pet. App. 13. The court nevertheless found the sentence substantively reasonable. Noting the district court's "detailed consideration of the § 3553(a) factors," *id.* at 16, the court found itself unable to say that a 210-month sentence was "outside the range of choice dictated by the facts of the case," *id.* at 17 (quoting *United States* v. *Jones*, 507 F.3d 657, 659 (8th Cir. 2007)).

b. Judge Benton filed a concurring opinion. Pet. App. 17-22. In his view, because the district court had committed *Gall* error, that court could not have seriously considered petitioner's arguments for a 60-month sentence, and "therefore the entire § 3553(a) explanation is tainted by the *Gall* error." *Id.* at 20. Judge Benton stated that, because the court of appeals had "no reliable basis for substantive review, this sentence should be reversed and remanded for resentencing in order to fulfill the mandate of *Gall*." *Id.* at 21. Judge Benton nevertheless concurred in the court of appeals' decision affirming petitioner's sentence because circuit precedent requiring plain-error review of unpreserved *Gall* error did not allow a remand. *Id.* at 22.

ARGUMENT

Petitioner contends (Pet. 14) that the court of appeals "circumvent[ed]" this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), when it held that the district court had not applied a presumption of rea-

sonableness to the Sentencing Guidelines range. He further argues (Pet. 23) that the court of appeals "circumvent[ed]" this Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), when it held that petitioner had not preserved his claim of procedural error at sentencing. Those claims lack merit, and the decision of the court of appeals is consistent with both *Rita* and *Gall*. Further review is not warranted.

1. a. This Court held in *Rita* that, although a court of appeals may apply a "presumption of reasonableness" to a within-Guidelines sentence, "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." 127 S. Ct. at 2465. The sentencing court's task is to consider the PSR, to listen to the arguments of the government and the defendant, and then to impose a sentence after evaluating the factors set out in 18 U.S.C. 3553(a). *Ibid.* The Court reiterated that point in *Gall*, stating that, in considering the Section 3553(a) factors, the district court "may not presume that the Guidelines range is reasonable." 128 S. Ct. at 596-597.

The Eighth Circuit has recognized and applied that principle. See, *e.g.*, *United States* v. *Henson*, 550 F.3d 739, 740 (2008), petition for cert. pending, No. 08-8933 (filed Feb. 20, 2009); *United States* v. *Toothman*, 543 F.3d 967, 970 (2008) ("A sentence within the Sentencing Guidelines range is accorded a presumption of substantive reasonableness on appeal, although the sentencing court does not enjoy the presumption's benefit when it determines the merits of the arguments by the prosecution or the defense that a Guidelines sentence should not apply."). The court in this case did not hold otherwise. Pet. App. 5-6.

Petitioner does not contend that the court of appeals articulated an incorrect legal standard in this case. Instead, he asserts (Pet. 21-23) that the court misread the record when it concluded that the district court had not applied a presumption of reasonableness. This Court generally does not grant review, however, "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

b. In any event, the decision of the court of appeals is correct. Based on the record in this case, the court correctly concluded that the district court had not applied a presumption that a within-Guidelines sentence would be reasonable. Pet. App. 6. Significantly, the district court never stated that it was applying a presumption of reasonableness. Petitioner relies (Pet. 22-23) on the district court's statements, in response to his request for a non-Guidelines sentence, that "there's got to be a ground for a variance," Pet. App. 30; that "the Guidelines * * * are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable," *id.* at 29-30; and that "[t]he Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals," *id.* at 36. Those statements do not indicate, however, that the district court itself applied a presumption of reasonableness. The Eighth Circuit has never held that district courts must apply a presumption of reasonableness in sentencing a defendant. Thus, the district court's statements—which expressly refer to the Eighth Circuit—are most naturally read as simply acknowledging the *appellate* presumption of reasonableness.

The district court's actions in sentencing petitioner also confirm that it did not apply a presumption of rea-

sonableness. As a matter of procedure, the court consulted the properly calculated Guidelines range, considered the other Section 3553(a) factors, and fully explained the reasons for its sentence. Pet. App. 35-37. In particular, the court repeatedly made clear its independent view that a substantial sentence was necessary to reflect the seriousness of the offense and to provide the necessary general deterrence, given the nature of the crimes that petitioner committed and the fact that "the number of images involved here and the amount of trading of files puts this case above the garden variety." *Id.* at 35. Both the court's process and its ultimate conclusion reflect independent judicial analysis, a balancing of factors, and the "adversarial testing contemplated by federal sentencing procedure" and Section 3553(a). *Rita*, 127 S. Ct. at 2465. Nothing in the record suggests that the sentencing court was swayed by a belief that the Guidelines range was presumptively reasonable.[1]

Nor is there any indication that the district court wished to impose a lower sentence but felt legally constrained from doing so. Instead, the court carefully balanced the competing factors of petitioner's personal history against the court's view that child-pornography offenses are among the most serious and harmful crimes and that petitioner's conduct was "above the garden variety." Pet. App. 35. Given the seriousness of the offense and the need for deterrence, the court concluded that a sentence of 210 months of imprisonment was appropriate. *Id.* at 35-37; see *id.* at 37 ("I conclude that

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[1] Petitioner's reliance (Pet. 20-21) on *United States* v. *Ross*, 501 F.3d 851 (7th Cir. 2007), is misplaced. *Ross* differs from this case because the district court there erroneously stated that the "lowest sentence *possible*" was the bottom of the Guidelines range. *Id.* at 854 (emphasis added).

the Guideline system adequately addresses the circumstances of *this defendant*.") (emphasis added).

Petitioner notes (Pet. 22) that the district court said "I can't do that" in response to petitioner's request for a non-Guidelines sentence. That does not demonstrate that the court believed it was not permitted to impose a non-Guidelines sentence, since an equally plausible interpretation is that the court simply did not see any basis for varying in this case. Indeed, the court expressly stated that the Guidelines are not mandatory, Pet. App. 36, and it asked petitioner to provide reasons for a variance of the magnitude petitioner had requested, *id.* at 30 ("[W]hat would the grounds be for a variance of the magnitude you are talking about?"). Moreover, that latter request was entirely appropriate. See *Gall*, 128 S. Ct. at 594 ("[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.").

c. Petitioner also contends (Pet. 22) that the court of appeals erred in presuming that the district court had correctly applied the law. The court of appeals, however, was merely applying the settled rule that, where ambiguity exists, the "usual presumption * * * is that a district court is aware of the law that it is called upon to apply." *United States* v. *Russell*, 870 F.2d 18, 20 (1st Cir. 1989); see *United States* v. *Carty*, 520 F.3d 984, 992 (9th Cir.) (en banc) ("We assume that district judges know the law and understand their obligation to consider all of the § 3553(a) factors, not just the Guidelines."), cert. denied, 128 S. Ct. 2491 (2008). The court of appeals did not rule out the possibility of error by the district court; it simply concluded that petitioner had

failed to demonstrate that the district court's ambiguous statements were erroneous.

2. Petitioner asserts (Pet. 28-34) that the court of appeals erred in applying plain-error review to his claim of procedural sentencing error. That claim lacks merit.

a. The courts of appeals agree that where, as here, a district court asks the parties if they have any objections to the sentence and "the relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court." *United States* v. *Vonner*, 516 F.3d 382, 385 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 68 (2008). Contrary to petitioner's suggestion that the "circuits are all over the board with differing standards of review," Pet. 33, "no court of appeals * * * has rejected this * * * approach to clarifying objections to a criminal sentence." *Vonner*, 516 F.3d at 391; see, *e.g.*, *In re Sealed Case*, 527 F.3d 188, 191-192 (D.C. Cir. 2008) ("Appellant did not object to the district judge's failure to explain his reasons either orally or in writing * * * . We therefore review the sentence for plain error."); *id.* at 198 n.3 (Kavanaugh, J., dissenting) (same); *United States* v. *Perkins*, 526 F.3d 1107, 1111 (8th Cir. 2008) ("Because Perkins did not object to the district court's articulation of its reasoning, we review that issue for plain error."); *United States* v. *Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007) (applying plain-error review to "the contention by both appellants that the district court failed adequately to explain its reasons for imposing the particular sentence within the range"), cert. denied, 128 S. Ct. 2081 (2008); *United States* v. *Verkhoglyad*, 516 F.3d 122, 127-128 (2d Cir. 2008) (same); *United States* v. *Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir.) (same), cert. denied, 129 S. Ct. 625 (2008); *United States* v.

Knows His Gun, 438 F.3d 913, 918 (9th Cir.) (same), cert. denied, 547 U.S. 1214 (2006); *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1220-1221 (10th Cir. 2006) (applying plain-error review to a challenge "to the *method* by which the district court arrived at [a] sentence"), cert. denied, 127 S. Ct. 3043 (2007); see also *United States* v. *Dragon*, 471 F.3d 501, 505 (3d Cir. 2006) (applying plain-error review to a claim that "the District Court failed to adequately consider the parsimony provision of [18 U.S.C.] 3553(a)").[2]

b. Petitioner is also incorrect in his assertion (Pet. 23) that the decision below, applying plain-error review to an unpreserved procedural error, "circumvent[s]" this Court's decision in *Gall*. As the Court explained in *Gall*, a court of appeals reviews a sentence under a two-step procedure. The court of appeals "must first ensure that the district court committed no significant procedural error." *Gall*, 128 S. Ct. at 597. Second, "[a]ssuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Ibid.*

Nothing in *Gall* suggests that parties are no longer obligated to raise all arguments concerning the appropriate procedures at sentencing. The decision in *Gall* therefore does not call into question this Court's prior

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[2] Petitioner suggests (Pet. 29) that the decision below is inconsistent with *United States* v. *Burnette*, 518 F.3d 942 (8th Cir. 2008). The court in *Burnette* held, however, in accord with the decision in this case, that "[p]rocedural sentencing errors are forfeited, and therefore may be reviewed only for plain error, if the defendant fails to object in the district court." *Id.* at 946. In any event, any intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

statement that courts of appeals, in reviewing criminal sentences, should apply "ordinary prudential doctrines, * * * [such as] whether the issue was raised below and whether it fails the 'plain-error' test." *United States* v. *Booker*, 543 U.S. 220, 268 (2005). A procedural error at sentencing is subject to the general principle that any error "not brought to the [district] court's attention" is forfeited on appeal, unless it meets the four-part standard for reversible plain error. Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 732 (1993).

This Court has regularly applied the plain-error rule in circumstances where a timely objection would have permitted the trial court to avoid error. The Court has noted the benefits of "concentrat[ing] * * * litigation in the trial courts, where genuine mistakes can be corrected easily." *United States* v. *Vonn*, 535 U.S. 55, 72 (2002) (applying plain-error review to an unpreserved claim that the district court failed to hold an adequate guilty-plea colloquy); see *Puckett* v. *United States*, No. 07-9712 (Mar. 25, 2009), slip op. 4-6. Indeed, "the point of the plain-error rule [is that] * * * the defendant who just sits there when a mistake can be fixed" cannot "wait to see" whether he is satisfied with the judgment, and, if not, complain to the court of appeals later on. *Vonn*, 535 U.S. at 73. This Court has already made clear that it will not "creat[e] out of whole cloth * * * an exception to [Rule 52(b)]." *Johnson* v. *United States*, 520 U.S. 461, 466 (1997). Nothing about the present case compels a contrary result.

Petitioner suggests (Pet. 30-31) that the court of appeals' application of plain-error review conflicts with Federal Rule of Criminal Procedure 51(b), which provides that "[a] party may preserve a claim of error by informing the court—when the court ruling or order is

made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). Petitioner's reliance on Rule 51(b) is misplaced. Under Rule 51(b), petitioner's request for a variance from the Guidelines range preserved his challenge to the substantive reasonableness of the sentence that was ultimately imposed, and the court of appeals therefore reviewed the reasonableness of that sentence for abuse of discretion. Pet. App. 12-13. With respect to the district court's asserted *Gall* error, however, petitioner did not satisfy the requirement of Rule 51(b), because he never "inform[ed] the court" of "the action [he wished] the court to take," *i.e.*, not requiring extraordinary circumstances for a variance. See *Vonner*, 516 F.3d at 391 ("Nor is it the case that a request for a variance in the district court by itself preserves *all* procedural and substantive challenges to a sentence," and counsel has an "obligation to raise all arguments concerning the appropriate procedures at sentencing and the bases for a lower or higher sentence.").[3]

c. Finally, petitioner suggests (Pet. 10-11) that the court of appeals erred in concluding that, notwithstanding the district court's plain error in applying an "extraordinary circumstances" requirement, the error did not affect petitioner's substantial rights. To the extent

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[3] This Court has denied several similar petitions involving the standard of review in procedural-error sentencing cases where the defendant made no objection in the district court. See, *e.g.*, *Gomez* v. *United States*, No. 08-7778 (Mar. 23, 2009); *Vasquez-Rodriguez* v. *United States*, No. 08-7046 (Mar. 23, 2009); *Vaughn* v. *United States*, 129 S. Ct. 998 (2009) (No. 08-6064); *Commodore* v. *United States*, 129 S. Ct. 487 (2008) (No. 07-11206); *Vonner* v. *United States*, 129 S. Ct. 68 (2008) (No. 07-1391). There is no reason for a different result here.

petitioner contends that the court of appeals erred in holding that the district court's error was harmless, that case-specific argument does not warrant this Court's review. In any event, in light of the district court's statements that petitioner "knew when [he was] doing it that it was wrong," Pet. App. 35, and that the large number of images and extensive amount of trading "put[] this case above the garden variety," *ibid.*, the court of appeals correctly concluded that there was no reasonable probability that the district court would have imposed a lower sentence but for its *Gall* error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

DONALD W. BAIN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1) Whether the Eighth Circuit is circumventing the rule of *Rita* by presuming the sentencing judge correctly understood and applied the law, when the record plainly shows the judge misstated and misunderstood the rule?

2) Whether the Eighth Circuit is circumventing the rule of *Gall* by creating its own preservation of error requirement that disavows the force of Rule 51(b) of the Federal Rules of Criminal Procedure?

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ARGUMENT

1. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *RITA* BY PRESUMING THE SENTENCING JUDGE CORRECTLY UNDERSTOOD AND APPLIED THE LAW, WHEN THE RECORD PLAINLY SHOWS THE JUDGE MISSTATED AND MISUNDERSTOOD THE RULE.

The Government cites three cases from 2009, but it does not cite *Nelson v. U.S.*, 129 S. Ct. 890 (2009). It does not explain why it takes an about face from *Nelson* in the instant case. In *Nelson*, the Government had conceded the sentencing judge had improperly applied a presumption of reasonableness in imposing a sentence at the bottom of the Guidelines range. 129 S. Ct. at 892. In *Nelson*, the sentencing judge said, "that 'the guidelines are advisory but under the case law of the Fourth Circuit Court of Appeals . . . The Guidelines are considered presumptively reasonable . . . That means that unless there's a good reason in the factors that I just reviewed with you, the Guideline sentence is the reasonable sentence . . . '" *U.S. v. Nelson*, 276 Fed. Appx. 331, 333 (4th Cir. 2008).

In the instant case, Judge Jarvey said the same thing:

> [DEFENSE COUNSEL] . . . I urge the Court under the circumstances and the facts of this case and what is presented to the Court to impose a minimum mandatory 60 months.

> THE COURT: I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. (App. 29-30).

The Government did not cite *Nelson* in its brief herein because it is now saying Judge Jarvey did not improperly apply a presumption of reasonableness. The language is virtually identical to the judge's statement in *Nelson*. As in *Nelson*, Judge Jarvey then imposed the sentence at the bottom of the Guidelines range, but now the Government wants to defend the Eighth Circuit. The Government now refuses to concede the *Rita* violation, and says Judge Jarvey's statements "are most naturally read as simply acknowledging the *appellate* presumption of reasonableness." (Opp. Br. 8) (emphasis supplied). The Government does not explain why it conceded the *Nelson* sentencing judge's reference to the Fourth Circuit's presumption was impermissible, but now it "naturally" reads Judge Jarvey's reference to the Eighth Circuit's presumption as a legitimate reference to an appellate standard. Of course, a sentencing judge has no legitimate or logical reason to be discussing an inapplicable appellate standard in the course of a sentencing. Why has the Government abandoned the voice of reason it chose in conceding the error in *Nelson*?

The other key ingredient the Government leaves out of its analysis is the fact that Judge Jarvey did not merely make a simple reference to the presumption of reasonableness in passing. The judge clearly demonstrated he did *not* understand the presumption that had been approved in *Rita*. Judge Jarvey twice said that *Rita* stood for the proposition that the courts in the Eighth Circuit could presume the **Guidelines are reasonable**. (App. 29-30, 36). Of course *Rita* does not allow that presumption and such a presumption would completely preclude a sentencing judge's independent analysis of factors. The Government does not discuss this aspect of Judge Jarvey's erroneous reasoning because it would destroy the Eighth Circuit's presumption that the sentencing judge understood *Rita* and applied it correctly. Not only does the Government fail to address Judge Jarvey's misunderstanding of *Rita*, it also makes this plainly incorrect statement:

> Nothing in the record suggests that the sentencing court was swayed by a belief that the Guidelines range was presumptively reasonable. (Br. Opp. 9).

The foregoing statement surprisingly came just one page after the Government quoted Judge Jarvey's separate statements that the Guidelines are now "presumptively reasonable" and "the Sentencing Guidelines are presumed reasonable **here** in the Eighth Circuit Court of Appeals." (Br. Opp. 8) (emphasis added) (App. 29-30, 36).

2. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *GALL* BY CREATING ITS OWN PRESERVATION OF ERROR REQUIREMENT THAT DISAVOWS THE FORCE OF RULE 51(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 51(b) of the Federal Rules of Criminal Procedure is stated very plainly. The two methods of preserving error are not separated by an "and" or even an "and/or." They are stated in the alternative "or." The rule does not restrict, nor prescribe, either alternative to certain situations or types of error. The Government has no answer for the fact a circuit court's adoption of a rule restricting the alternative methods is the adoption of a local rule that contravenes the rule Congress has approved in Rule 51(b). The Government does not address *Wingo v. Wedding,* 418 U.S. 461, 94 S. Ct. 2842 (1974) (Pet. 31).

The Government cites *U.S. v. Vonner*, 516 F.3d 382, 391 (6th Cir.), cert. den., 129 S. Ct. 68 (2008) for the very proposition that tore that *en banc* panel apart. The Government chooses to side with the judges of that panel that wanted to employ their own reading of Rule 51(b) to say *Gall* error must be preserved by a *Gall* specific objection, telling the sentencing judge exactly why he could not employ an Extraordinary Circumstances Test. (Opp. Br. 14). Of course, the practical problem with that argument is that Mr. Bain's sentencing took place four months before the *Gall* decision. Rule 51(b) does not require a trial lawyer to make arguments that educate a judge

as to how he is supposed to reach a decision. The rule requires the lawyer to tell the judge what sentence he wants. From a legal viewpoint, the dissent of Judge Clay in *Vonner*, explains exactly why this Court's requirement for reasonableness in sentencing does not allow a procedural cat-and-mouse game in the pursuit of justice:

> Moreover, by transforming *Booker's* required reasonableness review into mere plain error review when a defendant does not raise a separate objection to the "procedural reasonableness" of his sentence at the time of sentencing, the majority evades the responsibility, imposed on us by *Gall*, to insure that a defendant is afforded the opportunity to have his sentencing arguments considered and is given an adequate explanation of the reasons for the deprivation of his liberty. *See Gall* 128 S. Ct. at 597. *Vonner*, 516 F.3d at 406.

The "procedural reasonableness" preservation game is exactly what Judge Benton disapproved in his concurrence in the instant case. When the sentencing judge errs in his procedure in considering the Guidelines, the whole process is tainted and the appellate court cannot review the result for reasonableness. Judge Benton wrote:

> When Bain requested the 60-month sentence, the district court stated, "I can't do that, . . . If the Court gives [defendants] more than 45 or 50 percent off for putting their life at risk, the Court of Appeals reverses that as

> an unreasonable sentence." The district court did not seriously consider Bain's arguments for a 60-month sentence; therefore the entire § 3553(a) explanation is tainted by the *Gall* error.
>
> * * *
>
> Substantive review under *Gall* requires this court to defer to the district court's *unrestrained* opinion about what sentence is "sufficient but not greater than necessary," and the reasons therefor.
>
> * * *
>
> Since this court has no reliable basis for substantive review, this sentence should be reversed and remanded for resentencing in order to fulfill the mandate of *Gall*. *Bain*, 537 F.3d at 886 (Benton, J., concurring) (emphasis supplied).

Judge Benton then reeled off citations for five cases where the Eighth Circuit reversed sentences for procedural error. On two of those, the judge specifically noted there was no analysis for harmless error, plain error or substantive reasonableness, but simply a remand for a sentencing employing proper procedures. Judge Benton also cited another Eighth Circuit concurrence that said procedural error "thwarts reasonableness review – that is, it cuts off our review process before we even reach the issue of reasonableness." *U.S. v. Vickers*, 528 F.2d 1116, 1122-23 (8th Cir. 2008). *U.S. v. Bain*, 537 F.3d 876, 885-886 (8th Cir. 2008). When Mr. Bain said the

circuits "are all over the board with differing standards of review," Mr. Bain was referring to the litany of cases Judge Benton pointed out within the Eighth Circuit, and the deep split in the Sixth Circuit in *Vonner*. The Sixth Circuit split was the one Judge Moore's dissent described as "a growing split that certainly merits attention of the Supreme Court." (Pet. 31-33).

The pick-and-choose methods employed in a "specific objection" reading of Rule 51(b) does not lend itself to the procedural and substantive demands for reasonableness in *Booker* and *Gall*. The absurdity of manipulating those devices is shown quite simply within the confines of the Eighth Circuit's contradictory analyses in the instant case. When the judge plainly stated his misunderstanding of *Rita*, the panel presumed he knew the law, and did nothing wrong. When the panel then decides the judge did violate *Gall*, the majority decides the defense lawyer should have pointed out the defect for the judge as it would be explained by this Court four months later.

CONCLUSION

Sentencing decisions infected with *Rita* and *Gall* errors must be deemed unreasonable and remanded for a judgment determined by proper procedure. For that reason, a Writ should issue to allow this Court to explain the proper administration of justice.

Respectfully submitted,

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